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APPENDIX A

SEMINOLE ENTERTAINMENT, INC., ETC., Petitioner, v. CITY OF CASSELBERRY, FLORIDA, Respondent.

Case No. 5D01-2312

COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT

813 So. 2d 186; 2002 Fla. App. LEXIS 3771; 27 Fla. L. Weekly D 682

March 22, 2002, Opinion Filed

COUNSEL:

Steven G. Mason of Law Offices of Steven G. Mason, Orlando, for Petitioner.

Usher L. Brown, Anthony A. Garganese, and Jeffrey S. Weiss of Brown, Ward, Salzman & Weiss, P.A., Orlando, for Respondent.

JUDGES:

GRIFFIN and PALMER, J.J., concur. COBB, J., dissents with opinion.

OPINION:

PER CURIAM.

Seminole Entertainment, Inc. d/b/a Rachel's ("Rachel's"), petitions this court to issue a writ of certiorari directed to the circuit court's decision upholding the revocation of the Rachel's adult entertainment license. Applying the narrow scope of review required in this second tier certiorari proceeding, we deny the petition.

Casselberry served Rachel's with a notice of intent to revoke its adult entertainment license on the basis that Rachel's was permitting the sale and use of controlled substances, as well as prostitution and other prohibited sexual activities, to take place on its premises. Pursuant to Casselberry's adult entertainment code, an evidentiary hearing was held before the city commission which resulted in the revocation of Rachel's license.

Rachel's timely filed a petition for writ of certiorari in the circuit court alleging six claims of error. The circuit court denied the petition and affirmed the city commission's decision. In an extensive opinion, the circuit court addressed and rejected all of Rachel's claims. Rachel's thereafter timely petitioned this court for certiorari review of that decision.

In this second tier certiorari appeal, the scope of review is extremely narrow. As articulated by the Supreme Court in *Haines City Cmty. Dev. v. Heggs,* 658 So. 2d 523 (Fla. 1995):

> Certiorari in circuit court to review local administrative action under Florida Rule of Appellate Procedure 9.030(c)(3) is not truly discretionary common-law certiorari, because the review is of right. . . . . In other words, in such review the circuit court functions as an appellate court, and, among other things, is not entitled to reweigh the evidence or substitute its judgment for that of the agency.
>
> As the case travels up the judicial ladder, review should consistently become narrower, not broader. We have held that circuit court review of an administrative agency decision, under Florida Rule of Appellate Procedure 9.030(c)(3), is governed by

> a three-part standard of review: (1) whether procedural due process is accorded; (2) whether the essential requirements of law have been observed; and (3) whether the administrative findings and judgment are supported by competent substantial evidence. The standard of review for certiorari in the district court effectively eliminates the substantial competent evidence component. *The inquiry is limited to whether the circuit court afforded procedural due process and whether the circuit court applied the correct law.*

Id. at 530 (citations omitted) (emphasis added).

As to whether the circuit court afforded Rachel's procedural due process, in its petition for certiorari Rachel's does not even contend to the contrary. Rather, in asserting a due process argument, Rachel's improperly argues that it was not afforded procedural due process in the hearing before the city commission. Arguments as to the alleged lack of due process before the city commission were properly presented to the circuit court but are beyond the scope of the due process review available here.[1]

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[1] Rachel's also sought a determination of whether the city commission had failed to afford it due process by initiating a separate action in the circuit court seeking declaratory and injunctive relief against the city's enforcement of the license revocation. *Seminole Entertainment v. City of Casselberry,* 811 So. 2d 693, 2001 Fla. App. LEXIS 16909, 27 Fla. L. Weekly D19 (Fla. 5th DCA 2001) (*"Rachel's I"*). Since no party to that proceeding raised the impropriety of seeking injunctive relief by filing a separate action, rather than seeking review or a stay in the original proceedings, this court did not dismiss *Rachel's I* on procedural grounds. Had Casselberry raised such an objection, *Rachel's I* would have been dismissible on procedural grounds, since Rachel's had no right to initiate an independent action to enjoin the license revocation in light of Rachel's adequate remedy at law to review the propriety of

(Continued on following page)

As to whether the circuit court applied the correct law, the certiorari petition filed by Rachel's once again primarily and improperly focuses on alleged legal errors committed during the city commission proceedings, not the application of incorrect law by the circuit court during the certiorari proceedings. Such arguments are not properly before us for review. The only arguments directed toward the circuit court's alleged application of incorrect law were as follows:

> (1) The circuit court failed to apply the correct law in upholding the license revocation on the grounds that the notice of revocation was legally sufficient;
>
> (2) The circuit court failed to apply the correct legal standard in determining whether the evidence supported revocation; and
>
> (3) The circuit court applied the incorrect law in finding that the prompt judicial review constitutionally mandated in prior restraint

---

the city commission's action through certiorari in the original proceeding. Although Rachel's had the right to seek an injunction against the enforcement of the city's adult entertainment ordinances, it had no right to seek to enjoin the license revocation decision. *See City of Melbourne v. Hess Realty Corp.*, 575 So. 2d 774 (Fla. 5th DCA 1991). All Rachel's had a right to receive was certiorari review of the city commission's decision. If it wished to suspend the effect of that decision, it had the right to seek a stay pending review in this case. Rachel's never had a right to obtain from the circuit court an injunction preventing the city commission from proceeding with the license revocation based upon events at the hearing. In any event, the *Rachel's I* panel, by limiting the duration of the temporary injunction to the time necessary for issuance of a decision by this merits panel, in essence deemed the injunction action as a motion for stay associated with this certiorari proceeding.

> cases simply means prompt judicial access, not a prompt judicial decision.

However, in support of each of these arguments, Rachel's simply contends that the circuit court came to an incorrect legal conclusion based on the facts before it. As such, its arguments do not support a reversal in this second tier certiorari proceeding.

The remaining arguments raised by Rachel's relate to whether there was error in the conduct of the hearing by the city commission or evidentiary rulings made during that hearing. These issues were for determination by the circuit court in its first tier certiorari review and do not support a granting of second tier certiorari by this court. For example, as to the cross-examination rulings referenced in *Rachel's I,* Rachel's contends that the rulings denied it due process, whereas Casselberry argued that objections were properly sustained on the basis that the questions asked went beyond the scope of direct examination. A review of the cross examination at issue (attached hereto as an appendix) does not support a conclusion that the circuit court applied the incorrect law in denying the petition for certiorari on that issue. In addition, in applying the correct law, the circuit court could reasonably have found that disallowing a response to the question objected to was harmless error, since the question was related to whether the owners of the licensee had knowledge of the illegal conduct occurring on the premises and the circuit court found that the term "licensee" was broadly defined in the city ordinances so as not to require knowledge by the owners of the licensee.

We deny Rachel's petition for writ of certiorari. By the terms of this court's order in *Rachel's I,* the injunction

entered pursuant thereto automatically expires upon issuance of this opinion.

GRIFFIN and PALMER, J.J., concur.

COBB, J., dissents with opinion.

APPENDIX

CROSS-EXAMINATION OF MR. LANEY

BY COUNSEL FOR RACHEL'S:

Q: During the course of your investigation, which, as I understand it, was pretty much full-time for six months –

A: That's correct.

Q: – how much arrests were made for prostitution?

A: I don't have an exact number. If you'd like, I can count up what I've got here.

Q: Please. Please. And I take it, it would take a long time to do that?

A: I would say within a minute or two.

Q: Go for it.

A: There was a total of six –

Q: Six?

A: – entertainers from the Casselberry location that were charged with prostitution, two of which, which were also charged with RICO, organized crime.

Q: And what evidence do you have that any of the five individuals whom I named, who were on the board of

directors of Seminole Entertainment, had knowledge of the activities of these six individuals?

A: That's going to be part of an ongoing investigation, and I'm not going to answer that at this time.

MS. McINTOSH: Mr. Sheppard, did you say, the five individuals that I named?

COUNSEL FOR RACHEL'S: I thought that's what I said.

MS. McINTOSH: I only had four individuals down.

COUNSEL FOR RACHEL'S: I stand corrected. Thank you.

MS. McINTOSH: I just wanted to make sure we didn't miss one.

COUNSEL FOR THE CITY: For the record, my objection is that the testimony is the subject of a pending investigation.

COUNSEL FOR RACHEL'S: Well, I move for a continuance until it's completed so that we can have due process and the right to confront our witness.

COUNSEL FOR THE CITY: My response to that is, Mr. Mayor, is as far as the pending investigation or unrelated charges based upon statewide investigations and other criminal charges that have nothing to do with this civil revocation hearing, there's – and that the evidence before this commission, we will stand on the evidence as presented before this commission.

Should counsel, in his closing argument, deem that that evidence is insufficient, certainly he can argue that,

such as he already has with the state evidence. But there's no necessity for a continuance. We'll stand on the evidence that we present in these days of testimony.

COUNSEL FOR RACHEL'S: My position is that once an individual has a license granted by a governmental entity, that the Constitution of the United States, specifically the due process clause of the 14th Amendment, as well as Article 1, Section 9 of the Florida Constitution, affords a licensee due process of law.

And I believe in fundamental fairness and fundamental principles of due process would afford the licensee the opportunity to cross-examine and to pursue his theory of defense. But if I am confronted with "Oh, it's a matter of an ongoing investigation," I'm blocked from the very rudiment of due process, period.

And so respectfully, I'd ask that you direct the witness to answer my question, most respectfully, Mr. Mayor.

MAYOR PRONOVOST: Madam Attorney.

MS. McINTOSH: Mr. Mayor, the Cross-examination can't exceed the scope of the Direct Examination, and there was nothing direct about inquiry into ongoing. The evidence that you heard is the evidence that the city manager's moving forward with. That's the scope of inquiry.

MAYOR PRONOVOST: The objection is sustained.

COUNSEL FOR RACHEL'S: I want to object to gettin' double-teamed here. Counsel for the city manager makes an objection and counsel for the board is arguing, and I never have an opportunity to respond. And that is denial of due process in and of itself.

MAYOR PRONOVOST: Thank you, Madam Attorney.

MS. McINTOSH: I'm here –

COUNSEL FOR RACHEL'S: I can't hear.

MS. McINTOSH: I'm here to function as legal counsel for the city commission, so all I'm doing is providing you with legal advice as to the objections that you're hearing.

MAYOR PRONOVOST: Thank you.

COUNSEL FOR RACHEL'S: I would also submit that there is no exception in the civil proceeding for, quote, an ongoing investigation, unquote.

COUNSEL FOR THE CITY: Mr. Mayor, I'll withdraw the formal objection based upon the ongoing nature of the investigation, and basically object because of the fact that the testimony or the question exceeds the scope of Direct, which actually is provided directly in the code. And although these are lax rules of procedure, the code requires for Cross Examination to follow that rule.

MAYOR PRONOVOST: Mr. Sheppard.

COUNSEL FOR RACHEL'S: The theory of the City here, as I understand it is, that the licensee or any person on its or his behalf, or any person listed on the application. If they allow possession or sale of a controlled substance, if they allow prostitution, if they allow any specified sexual activity, then the license is subject to revocation. Now, counsel stood up here and got the second shot at an opening statement, and that's exactly what he told you he's going to prove.

Now, the method by which he's attempting to prove it is, that these low-level people, quote, are acting as management, end quote. Well, they got to get their power from somewhere and it ain't coming from the dancers. It's got to come from above. So the purpose of my inquiry is, who gave Mr. Otero any authority to do anything? Who gave any of these individuals by whom the witness is characterizing as a quote, management, end quote, the power to quote, manage? I'm sure the chief of police gave this sergeant his power. Did anybody above these rogue managers give them the power to act on their behalf?

And that's my purpose of inquiry, is that we have in evidence, Exhibit 1. Exhibit 1 has five – four names on it. I got that right. Got four names on it. He's never – he can't give you any evidence about them. And what I'm asking is, does he have any evidence? And he says, "I can't tell you." Well, how in the world is anybody going to carry their burden here if he isn't able to answer those questions?

COUNSEL FOR THE CITY: Mr. Mayor, in response, counsel has asked this witness whether or not this witness had any direct knowledge as of the four individuals whether they knew or participated in the different categories of the testimony that Sergeant Laney has testified to. He's already established that fact, the fact that this witness has admitted and said that he, himself – as far as the testimony that's before this commission – did not see – or his testimony is what it is with regard to the limitations with regard to these four individuals.

As counsel has said, that is not, by any means, all that the city manager is relying upon for submitting this case of revocation to you. That is, counsel has, in my opinion and the city manager's opinion, mischaracterized these

individuals for purposes of the record as, quote, low-level, end quote, employees, and quote, rogue, end quote, employees. The evidence is what it is. Mr. Otero with his testimony is who he is. Whatever you decide as fact-finders is who is he. So is Mr. Rexroad. So are the dancers that were named.

I am comfortable to submit the record to you with its limitations. The questions exceeded the scope of Direct, and there's no necessity for going any further. Counsel's already established the facts that he wanted to establish.

MAYOR PRONOVOST: Mr. Sheppard.

COUNSEL FOR RACHEL'S: I have nothing further to submit.

MAYOR PRONOVOST: Okay. Objection is sustained. Please continue.

COUNSEL FOR RACHEL'S: Thank you.

BY COUNSEL FOR RACHEL'S:

Q. Do you have any evidence that either of the four individuals that I named that are in Exhibit 1 – you have Exhibit 1 there before you, correct –

A. Yes, sir.

Q: those four individuals, do you have any evidence to indicate that they knew of any of the drug transactions about which you've testified?

A: Once again, it's part of an ongoing investigation and I'm not going to answer that.

COUNSEL FOR RACHEL'S: Same argument, I suppose.

MS. McINTOSH: I have a question of the witness. You're saying that, as you stand here today, you are not prepared to provide this commission with any evidence relating to that question; is that true?

THE WITNESS: Yes, ma'am; that's correct.

MS. McINTOSH: So his answer is, none.

COUNSEL FOR RACHEL'S: That isn't what he answered. Is your answer, none?

MS. McINTOSH: He's not giving you any, and that's the answer.

COUNSEL FOR RACHEL'S: Well, but that isn't the answer to my question is, none. I'll accept that if that's the answer. If somebody wants to stipulate to me that there is no evidence that either of these four individuals knew of any drug transactions, I'll go on. But that isn't what he said. He said, "I'm not telling you," is what he said. And I'd say to you – and I respect the ongoing investigation privilege. It just doesn't simply apply here, is what my position is. But he's not telling me, no, he doesn't know of any.

MS. McINTOSH: No. But what he's saying is that, he's not going to testify as to if there's any evidence.

COUNSEL FOR RACHEL'S: And I'm asking you to compel him to, Mr. Mayor. In the – in the spirit of due process and fundamental fairness, I have the right to ask him those questions and I have a right to receive the answers.

MS. McINTOSH: Mr. Mayor, as a matter of law, I would advise you that the question exceeds the scope of

Direct Examination. There was no Direct regarding any ongoing investigation or inquiry into what other – the folks listed in Exhibit 1 did. He's testified as to what he saw at Rachel's.

MAYOR PRONOVOST: Objection overruled.

COUNSEL FOR RACHEL'S: Yes, sir.

DISSENT BY:

COBB

DISSENT:

COBB, J., dissenting.

A quasi-judicial proceeding contemplates a certain level of basic fairness in order to comply with the requirements of due process. *See Hadley v. Department of Administration,* 411 So. 2d 184 (Fla. 1982). As I read the transcript of the proceeding before the city commission in this case, that basic fairness was denied. For example, the city attorney flatly advised the mayor, as the presiding officer at the hearing, that the city's principal witness was not going to subject himself to cross-examination on a crucial issue, thereby depriving Rachel's of even a proffer of evidence on that issue. And the mayor agreed. Despite the stringent standard of review for a second tier of certiorari review, I would hold that the circuit court failed to apply the correct law in its consideration of this issue.

Rachel's is entitled to a new hearing, one which comports with elementary notions of due process.[1]

[1] The harmless error analysis has no application to this matter since it cannot be determined (1) what the witness' answer would have been, (2) what avenues of inquiry would have developed had an answer favorable to Rachel's been given, and (3) what effect all this would have had on the tribunal's consideration as to: (a) whether a violation of the licensing laws was established and (b) if so, whether a penalty short of revocation might have been appropriate. *See Austing v. State,* 804 So. 2d 603 (Fla. 5th DCA 2002).

APPENDIX B

SEMINOLE ENTERTAINMENT, INC., Appellant, v. CITY OF CASSELBERRY, FLORIDA, Appellee.

Case No. 5D01-811

COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT

811 So. 2d 693; 2001 Fla. App. LEXIS 16909; 27 Fla. L. Weekly D 19; 26 Fla. L. Weekly D 2822

November 30, 2001, Opinion Filed

COUNSEL:

Steven G. Mason of Law Offices of Steven G. Mason, Orlando, for Appellant.

Usher L. Brown and Anthony A. Garganese of Brown, Ward, Salzman & Weiss, P.A., Orlando, for Appellee.

JUDGES:

COBB, J. HARRIS and PETERSON, JJ., concur.

OPINION BY:

COBB

OPINION:

COBB, J.

The appellant, Seminole Entertainment, Inc. d/b/a Rachel's, appeals the circuit court's denial of its motion for a temporary injunction against the City of Casselberry, which had revoked its adult entertainment license by order dated January 31, 2001.

Prior to revocation, Rachel's had been operating as a licensed adult entertainment establishment in Casselberry, Seminole County, Florida, for approximately ten years, featuring striptease/erotic dancing. Such entertainment was a permitted activity under Casselberry's adult entertainment code.[1] On November 10, 2000, Casselberry served Rachel's with a notice of intent to revoke its license on the basis that the licensee was permitting the sale and use of controlled substances, prostitution and other prohibited sexual activities on its premises. Casselberry's code provides for a hearing before the city commission in regard to revocation proceedings if requested. Once a hearing date was set, Rachel's moved to disqualify the commission for bias. This motion to disqualify was denied and subsequent to the revocation hearing a final revocation of license was filed.

Rachel's then filed a two count complaint with the circuit court seeking a permanent injunction and declaratory relief. In addition, Rachel's sought a temporary injunction. A hearing was held on this later motion on March 9, 2001. The circuit court ultimately denied Rachel's motion for temporary injunction and that order is the subject of this appeal.

Rachel's indicates in its initial brief that it demonstrated a substantial likelihood of success on the merits since it was denied a neutral and unbiased fact-finder. The evidence supporting the motion to disqualify showed that

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[1] The City's adult entertainment licensing ordinance was expressly declared to be valid in *Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251 (11th Cir.1999).

the Casselberry mayor (Pronovost), who subsequently presided over the proceedings and ruled upon legal objections to proffered evidence and testimony, had run for office on a platform directed against alleged "illegal activities" at "strip bars" in Casselberry, such as Rachel's. The mayor had publicly charged that Rachel's was a hot spot of drug proliferation, underage drinking, and prostitution. Prior to the hearing, the Casselberry city manager, acting as the prosecutor of the case against Rachel's, had consulted with various commission members about the illegal activities at Rachel's. The motion to disqualify also asserted that one commissioner (Henson) actually participated in an undercover investigation by the Casselberry police against Rachel's.[2] Pursuant to the City of Casselberry's code, the procedures utilized in a revocation hearing are those typically used in a civil case with the city manager having the burden of proof. The hearing is to also be "informal."

The evidence[3] presented at the hearing by the city manager in his prosecutorial role basically showed that illegal activities were observed at Rachel's, but arguably may have occurred outside the presence of any key managerial personnel. Virtually all objections raised by Rachel's were overruled by Pronovost; those by the city manager were inevitably sustained. Considerable testimony was presented about illegal activity at a different nightclub located in Orange County. Significantly, the principal

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[2] Commissioner Henson ultimately cited a conflict of interest and did not participate in any vote.

[3] The commission decided to utilize a "clear and convincing" standard as opposed to a preponderance of the evidence standard.

witness for the City, one Laney, refused to answer an inquiry by counsel for Rachel's in regard to any information showing that the owners of Rachel's had knowledge of any illegal activities on the premises. The basis for this refusal was that any such information was part of an ongoing investigation. The mayor then improperly sustained the City's objection to further cross examination by Rachel's in this regard.

On appeal the City concedes that the hearing was "quasi-judicial in nature."[4] *See Vicbar, Inc. v. City of Miami,* 330 So. 2d 46 (Fla. 3d DCA 1976). It points out, however, that the quality of due process required in a quasi-judicial hearing is not the same as that to which a party to a full judicial hearing is entitled, and such hearings are not controlled by strict rules of evidence and procedure. *See Lee County v. Sunbelt Equities, II, Ltd. Partnership,* 619 So. 2d 996, 1002 (Fla. 2d DCA 1993). The City also points out that its adult entertainment code specifically prohibits prostitution, sexual activity or drug use at licensed establishments where the licensee "or any person on its or his behalf" has knowingly allowed such conduct. The City may regulate such unlawful conduct

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[4] The standard for determining whether an act of a municipal corporation is quasi-judicial is whether that action is dependent upon a showing made at a hearing required by law to afford due process to the affected party. *Hargrove v. Town of Cocoa Beach,* 96 So.2d 130 (Fla.1957); *City of Tampa v. Islands Four, Inc.,* 364 So.2d 738 (Fla. 2d DCA 1978); *Board of County Comm'rs of Hillsborough County v. Casa Development Ltd., II,* 332 So.2d 651 (Fla. 2d DCA 1976). The act is quasi-judicial if due process is simply required by the nature of the right or privilege at issue. A licensee has a property right in renewal of a business license of which he cannot be deprived absent the requisites of due process. *Vicbar.*

pursuant to its police powers. *City of Daytona Beach v. Del Percio,* 476 So. 2d 197, 204 (Fla. 1985).

Rachel's counters that quasi-judicial proceedings, such as those herein concerned, contemplate a certain level of basic fairness in order to afford due process. *See Hadley v. Department of Administration,* 411 So. 2d 184 (Fla. 1982); *Lee County,* 619 So. 2d at 1002; *Jennings v. Dade County,* 589 So. 2d 1337 (Fla. 3d DCA 1991). As succinctly stated in one leading treatise:

> A hearing or trial in an administrative proceeding to revoke a license or permit must be fair. While the tribunal may not be a court or the proceeding strictly judicial, there must be an orderly and fair procedure. Technical legal rules of evidence and procedure may be disregarded, but no essential element of a fair trial can be dispensed with unless waived. The licensee must be fully apprised of the claims against him or her and of the evidence to be considered, and must be given the opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. The presiding official should be judicial in attitude and demeanor and free from prejudgment and from zeal for or against the licensee or permittee. . . . [Footnotes omitted].

9 McQuillin, Municipal Corporations, § 26.89 (3rd Ed.).

The City points out that there is authority for the proposition that mere political bias or an adverse political philosophy is not sufficient to invalidate a quasi-judicial proceeding or disqualify members of a city commission. *Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n,* 426 U.S. 482, 49 L. Ed. 2d 1, 96 S. Ct. 2308 (1976)

(union felt that board manifested personal bitterness towards teachers in hearing to determine whether said teachers should be dismissed. Court found that teachers did not show that board members had the kind of personal or financial stake in the decision that might create a conflict of interest).

In this case, Rachel's has established more than mere political bias or an unfriendly political atmosphere. In effect, it was denied the right to challenge, through cross-examination, the testimony of the principal witness against it. The evidentiary rulings by Mayor Pronovost were not merely erroneous but rather reflect a bias so pervasive as to have rendered the proceedings violative of the basic fairness component of due process. We reverse the order denying Rachel's motion for a temporary injunction.

REVERSED.

HARRIS and PETERSON, JJ., concur.

APPENDIX C

8 Fla. L. Weekly Supp. 613a

SEMINOLE ENTERTAINMENT, INC., d/b/a RACHEL's, Petitioner, vs. CITY OF CASSELBERRY, FLORIDA, a municipal corporation, Respondent.

Circuit Court, 18th Judicial Circuit (Appellate) in and for Seminole County.

Case No. 01-23.

Decision filed July 17, 2001.

Debra S. Nelson, Judge.

Petition for Writ of Certiorari.

Counsel: Steven G. Mason, for Petitioner.

Anthony A. Garganese, for Respondent.

(NELSON, J.) The Plaintiff, Seminole Entertainment, Inc. d/b/a Rachel's (hereinafter "Rachel's"), has filed a Petition for Writ of Certiorari, challenging the revocation of its adult entertainment license by the City of Casselberry.

During a lengthy undercover operation by the Seminole County Sheriff's Office and the City/County Investigative Bureau, law enforcement agents obtained evidence that prostitution, lewd activity, and drug sales occurred on the premises of the Rachel's club, which is owned by Seminole Entertainment, Inc. As a result of this evidence, several arrests were made, and the City held proceedings to revoke Rachel's adult entertainment license. The City Commission revoked the Petitioner's adult entertainment license for a period of two years, effective February 1, 2001.

The Petitioner claims six errors during the hearing that require reversal: (1) that the City Commission should

have disqualified itself; (2) that there was no due process afforded at the hearing; (3) that there was insufficient evidence that ownership knew or should have known that the illegal activities occurred on the premises; (4) that the City Commission had unfettered discretion to suspend or revoke the license; (5) that the City Commission used the incorrect standard of review; and (6) that there is no prompt judicial review. For the reasons stated below, the decision of the City Commission is affirmed.

When considering an appeal from a final administrative order, the Circuit court must look to three components: whether procedural due process was accorded to the party seeking review, whether the essential requirements of the law were observed by the enforcement board, and whether the administrative findings and judgment are supported by competent, substantial evidence. *City of Deerfield Beach v. Vaillant,* 419 So.2d 624, 626 (Fla. 1982). The circuit court may not reweigh the evidence or substitute its judgment about what should be done for the administrative agency. *Lee County v. Sunbelt Equities,* 619 So.2d 996 (Fla. 2d DCA 1993).

Disqualification of the City Commissioners

The actions of the City Commission are not governed by the same rules as an elected or appointed judge. There is no "right" to have the City Commission recused, as there is such a "right" in the case of disqualifying a judge.[1] Chapter 112, Florida Statutes, and Section 286.012, Florida Statutes set forth the only basis on which a city commissioner may abstain from voting. A reading of these

[1] *See Fla. R. Jud. Admin. 2.160.*

statutes shows that a city commissioner may abstain from voting is when there is a conflict of interest." *See §286.012, Florida Statutes.* The only time a city commissioner must abstain from voting is when a measure would inure to the commissioner's "special private gain or loss." *See §112.3143(3)(a), Florida Statutes.* The Petitioner has not alleged that any city commissioner would receive any "special gain or loss" as a result of the vote on the revocation of the license. Even if there were some personal bias or prejudice against the Petitioner by the city commissioners, the rules do not allow the commissioner to abstain. *See Op. Fla. Comm. Ethics* 79-14 (1979) ("it is clear that, when adopting the Code of Ethics, the Legislature was concerned primarily with the effect of a public official's economic interests and relationships upon the performance of his public duties, rather than the effect of his personal preferences or animosities.").

This Court is also guided by the United States Supreme Court's opinion in *Hortonville Joint School District #1 v. Hortonville Education Association, et al.,* 426 U.S. 482 (1976). In *Hortonville,* the court ruled that political opposition or political bias of school board members against the teachers' union was not sufficient to disqualify elected officials. *Id.* As such, the court would not interfere with the exercise of the local government's discretion notwithstanding evidence that the elected officials had, in the context of political speech, made statements from which one could infer an anti-union bias. *Id.* The fact that the elected officials may have expressed political and policy views as a legislator or politician on an issue that may potentially come before them in a quasi-judicial proceeding does not prevent them from deciding a particular case fairly. *Id.* In the instant case, none of the alleged prejudicial statements made by the City Commissioners related specifically to the license revocation proceedings.

Therefore, there was no basis for the City Commissioners to disqualify themselves.

Due Process under Article I, Section 9 of the Florida Constitution

The Petitioner's second claim is that they were not afforded procedural or substantive due process as guaranteed by Article I, Section 9 of the Florida Constitution. The Petitioner claims that the revocation of its adult entertainment license violates its substantive due process right to freedom of expression. The Petitioner also cites numerous instances where it believes that the City Commissioners failed to afford procedural due process.

The Petitioner's claim that its substantive due process rights have been violated is without merit. "When 'speech' and 'non-speech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms." *United States v. O'Brien,* 391 U.S. 367, 1678-79 (1968). In order to determine whether a government regulation is sufficiently justified, the regulation must satisfy a four-prong test. The regulation is sufficiently justified

> if it is within the constitutional power of the government; it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id.

The Supreme Court, in *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), adopted the *O'Brien* test for evaluating laws which regulate public nudity. In *Erie,* the Supreme Court upheld an ordinance that banned all public nudity. Justice O'Connor, writing for the Court, acknowledged that nude dancing is expressive conduct, although "only within the outer ambit of the First Amendment's protection." *Id.* at 289. Justice O'Connor went on to hold that "government restrictions on public nudity . . . should be evaluated under the framework set forth in *O'Brien* for content-neutral restrictions on symbolic speech. *Id.* The Supreme Court, in *Erie,* addresses the third and fourth prongs of the *O'Brien* test. As to the third prong, the Court stated that "the State's interest in preventing harmful secondary effects of nude dancing is not related to the suppression of expression." *Id.* at 293. The Court also dealt with the fourth prong of the *O'Brien* test, finding that the dancers at such an establishment are "free to perform wearing pasties and G-strings. Any effect on the overall expression is de minimis." *Id.* at 294.

In the case at bar, the dancers are allowed to dance erotically at the Petitioner's place of business, even after the revocation of the adult entertainment license, so long as they wear bikini tops and sexy dresses. This, according to *Erie,* is a de minimis intrusion, satisfactory under the *O'Brien* test. In fact, the Supreme Court has upheld a sanction as extreme as a one year closure, under the fourth prong of the *O'Brien* test, in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986). In *Arcara*, a case factually similar to the instant case, the Supreme Court held that such a sanction "was directed at unlawful conduct having nothing to do with . . . expressive activity." *Id.* at 707. Therefore, the Petitioner has not shown that it has

suffered a deprivation of its substantive due process right to freedom of expression as guaranteed under Article I, Section 9 of the Florida Constitution.

The Petitioner's claim that it was deprived of its procedural due process rights is also without merit. The notice provided told the Petitioner that the charges were that "the licensee or a person on its behalf or a person listed on the application pursuant to Section 14-80(b) of this article has knowingly allowed possession, use, or sale of controlled substances on the premises of the establishment or business; (2) . . . knowingly allowed prostitution on the premises of the establishment; [and] (3) . . . knowingly allowed any specified sexual activities to occur on the premises of the establishment." Therefore, the Petitioner knew the nature of the charges brought against it at the hearing. These were the same violations that the Petitioner was found to have violated after the hearing. As such, the Petitioner cannot claim to have been "surprised" by the charges brought at the hearing. The Petitioner had the assistance of counsel at the hearing. Counsel conducted cross-examination of the witnesses regarding the events which were alleged to have occurred at the establishment, but chose not to put on its own witnesses. The Petitioner also claims that inadmissible hearsay tainted the proceedings. However, the rules of evidence are not as strictly enforced in a quasi-judicial proceeding. Therefore, hearsay is admissible in this type of proceeding. Finally, the order by the Board of City Commissioners comports with due process, setting forth the factual basis for its findings.

Failure to Prove that the Owners Knew or Should Have Known of the Alleged Improprieties

The Petitioner claims that there was insufficient evidence to establish that the owners knew or should have known that the alleged violations were occurring on the premises of the business. However, Section 14-70 of the City of Casselberry Adult Entertainment Code defines "licensee" as "any person . . . who . . . operates or controls the establishment or business," and defines an "operator" as a "manager" or "doorman." Therefore, the owners are held responsible for the actions of those they leave in control of the business. The City Commission found that both managers and doormen knew of the activities that were alleged to have occurred on the premises of the business. Therefore, this claim has no merit.

The City Code Vests Unbridled Discretion with the City Commission

The Petitioner's next claim is that the City Commission has the unfettered and unbridled discretion to determine whether to revoke or suspend a license under the code. However, this is without merit. The revocation of a license can occur only after a showing that the licensee knowingly allowed the use or sale of controlled substances on the premises of the business, knowingly allowed prostitution on the premises of the business, or knowingly allowed specified sexual acts on the premises of the business. A suspension does not require such knowledge. Therefore, there are different standards that must be met in order for the City Commission to suspend or revoke an adult entertainment license, and the City Commission does not have the alleged unfettered discretion to suspend or revoke a license.

The City Commission Relied on the Wrong Standard of Proof

The claim that the City Commissioners relied on the wrong standard of proof is without merit. In Paragraph 21 of its order, the City Commission states that "[a]lthough Article III, Section 14-93(b)(3) of the Casselberry Code of Ordinances provides that the City Manager has the burden of proof by a preponderance of the evidence, the City Commission, in an abundance of caution, has deliberated and rendered its findings of fact and order in this case utilizing the higher standards of proof of clear and convincing evidence." There was also a motion and second at the hearing, before the deliberations, to use the higher standard of clear and convincing evidence. There is no evidence that the City Commission did not understand the higher standard, and this Court will not require the City Commission to affirmatively explain the nuances of the appropriate burden of proof before making its decisions. This Court also finds that the burden of proof was not improperly shifted to the Petitioner at the hearing.

The Casselberry Code does not Provide for Prompt Judicial Review

The Petitioner claims that, since the Casselberry Code at issue in this case is a prior restraint on expression, there must be meaningful and prompt judicial review. For the reasons stated below, this argument has no merit.

First, the code at issue in this case is not a prior restraint, but a punishment for subsequent acts. The City's application of the Code was "not the result of any prior restraint . . . but is the direct result of appellant's abuse of their licenses." *Bay Area News, Inc. v. Poe*, 364

So. 2d 830 (Fla. 2d DCA 1978). The Petitioner was permitted to present nude dancing when it possessed its adult entertainment license. Only the conduct in violation of the ordinance allowed the City to revoke the license under the Code.

Second, the Code at issue here has already been reviewed and found to be constitutional in *Boss Capital v. City of Casselberry*, 187 F. 3d 1251 (11th Cir. 1999). In *Boss Capital*, the Eleventh Circuit addressed the "judicial review" provision of the Casselberry ordinance. The court held that prompt judicial review only means access to prompt judicial review, not prompt judicial decision and certainly not the right of the executive branch to mandate how quickly the judicial branch does its business. This decision applies to licensing schemes, not censorship cases. However, the case at bar is a licensing issue, involving misconduct under the license, not a censorship issue, involving the prevention of expression. This Court now adopts the reasoning of the Eleventh Circuit, as set forth in *Boss Capital.*

Since the Petitioner has failed to show that there was a denial of procedural due process, that the essential requirements of law were not followed, or that the findings were not supported by substantial, competent evidence, the Petition for Writ of Certiorari is hereby DENIED.

APPENDIX D

Supreme Court of Florida
MONDAY, DECEMBER 30, 2002

CASE NO.: SC02-1032
Lower Tribunal No.: 5D01-2312

SEMINOLE ENTERTAINMENT, INC., ETC.	vs.	CITY OF CASSELBERRY, FLORIDA
Petitioner(s)		Respondent(s)

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. *See* Fla. R. App. P. 9.330(d).

ANSTEAD, C.J., and WELLS, PARIENTE, QUINCE and CANTERO, JJ., concur. SHAW and LEWIS, JJ., dissent.

Respondent's Motion to Strike Supplemental Authority is hereby denied.

ANSTEAD, C.J., and SHAW, WELLS, PARIENTE, LEWIS, QUINCE and CANTERO, JJ., concur.

A True Copy
Test:

/s/ Thomas D. Hall [SEAL]
Thomas D. Hall
Clerk, Supreme Court

bh
Served:
HON. FRANK J.
HABERSHAW, CLERK
HON. MARY ANNE MORSE,
CLERK
W/COPY TO CIRCUIT
JUDGE
VICTOR L. CHAPMAN
RALPH STEVEN RUTA
USHER LARRY BROWN
STEVEN G. MASON
JEFFREY S. WEISS
ANTHONY ANGELO
GARGANESE

APPENDIX E

Sec. 14-92. Suspension and revocation of license.

The City Manager or his designee shall suspend a license when he or his designee determines that any one (1) of the following has occurred:

(a) For purposes of this Section 14-92, the term "violation" shall mean an incident having occurred at, or by, an adult entertainment establishment or sexually oriented business which is prohibited by the provisions of this Article or made unlawful by F.S. chs. 561, 562, 563, 564, 565, 794, 796, 800, 826, 827, 847, 893 or 895, or an analogous federal statute.

(b) Inspection of records and premises. In the event that the City Manager or his designee determines that the licensee or an operator at or of the licensee has refused to allow any inspection of records or premises as required by this Article; the City Manager or his designee may suspend the license for a period not to exceed 30 days.

(c) Illegal Activity/Suspension.

(1) In the event three or more violations occur within a two year period, and convictions result from at least three of the violations, the City Manager or his designee shall, upon the date of the third conviction, notify the licensee that the license shall be suspended for a period of 30 days unless good cause is shown in accordance with this Article, that the violations have not occurred. For purposes of calculating this two year period, the two year period shall be deemed to be those 24 months occurring immediately prior to the violation occurrence date for which the 30 day suspension is sought.

(2) In the event one (1) or more violations occur within a two (2) year period from the date of the last violation occurrence date from which the conviction resulted in a thirty (30) day suspension pursuant to subsection (b)(1), but not including any time during which the license was effectively suspended, and a conviction results from one (1) or more of the violations, the City Manager or his designee shall, upon the date of the latest conviction, provide notice to the licensee that the license shall be suspended for a period of ninety (90) days unless good cause is shown in accordance with this Article that the violation has not occurred.

(3) In the event one (1) or more violations occur within a two (2) year period from the date of the last violation occurrence date from which the conviction resulted in a ninety (90) day suspension pursuant to subsection (b)(2), but not including any time during which the license was effectively suspended, and a conviction results from one (1) or more of the violations, the City Manager or his designee shall, upon the date of the latest conviction, provide notice to the licensee that the license shall be suspended for a period of One Hundred Eighty (180) days unless good cause is shown in accordance with this Article that the violation has not occurred.

(c) Revocation. The City Manager or his designee shall revoke a license when he or his designee determines that any one (1) of the following has occurred.

(1) There has been one (1) or more violations that have occurred within a two (2) year period from the date the last violation occurrence date from which the conviction resulted in a One Hundred Eighty (180) day suspension pursuant to (c)(3), but not including any time during

which the license was effectively suspended, and a conviction results from one (1) or more of the violations, the City Manager or his designee shall, upon the date of the latest conviction, provide notice to the licensee that the license shall be revoked unless good cause is shown in accordance with this Part that the violation has not occurred.

(2) The licensee or any person on its or his behalf or any person listed on the application pursuant to Section 14-80(b) of this Article, gave false or misleading information in the material submitted during the application process.

(3) The licensee or any person on its or his behalf or any person listed on the application pursuant to Section 14-80(b) of this Article has knowingly allowed possession, use, or sale of controlled substances on the premises of the establishment or business or when with a customer.

(4) The licensee or any person on its or his behalf or any person listed on the application pursuant to Section 14-80(b) of this Article has knowingly allowed prostitution on the premises of the establishment or business or when with a customer.

(5) The licensee or any person on its or his behalf or any person listed on the application pursuant to Section 14-80(b) of this Article knowingly operated the adult entertainment establishment or sexually oriented business during a period when the licensee's license was suspended.

(6) Except in the case of an adult motel, the licensee or any person on its or his behalf or any person listed on the application pursuant to Section 14-80 of this Article has knowingly allowed any specified sexual activities to occur on the premises of the establishment or business.

(d) Effective dates of suspensions and revocations. Except as otherwise provided in this Article, all periods of suspension and revocation shall become effective 15 days after the City Manager or his designee posts the notice of suspension or revocation at the licensee's establishment, or on the date that the licensee turns in his, her or its license, whichever happens first. The suspension or revocation shall be abated in the event that the licensee files a timely challenge to the suspension or revocation in accordance with the procedures set forth in this Article or upon order of a court of competent jurisdiction. If an adult entertainment establishment or sexually oriented business license is revoked, the licensee shall not be issued another adult entertainment establishment or sexually oriented business license for a period of two years running from the date the revocation actually takes effect after all abatement periods have lapsed.

(e) Other remedies. Notwithstanding the provisions of this Section, the City may pursue any and all other available remedies through any and all other available processes and procedures available to correct violations of City codes. Included within such remedies are the enforcement actions set forth in this Article, actions in a court of competent jurisdiction for injunctive or other appropriate relief, criminal prosecution, code enforcement proceedings, the issuance of citations, the suspension or revocation of permits relating to health or safety matters, and any and all other remedies available under the laws of the State of Florida and the United States.

(Ord. No. 99-934, § I, 6-7-99)

APPENDIX F

Sec. 14-93. Suspension and revocation proceedings.

(a) Challenge to suspension or revocation. If the City Manager or his designee notifies a licensee in writing of the pending suspension or revocation of a license as provided in Section 14-92 of this Article, then the suspension or revocation shall become final and effective fifteen (15) days after mailing to the licensee's record address, posting at the licensed establishment, or actual delivery of the notice to the licensee, unless the licensee first files with the City Manager or his designee a written response stating the reasons why the suspension or revocation is alleged to be in error or inappropriate and a written notice of intent to challenge the suspension or revocation requesting a hearing to determine whether the suspension or revocation will become effective. The suspension or revocation shall be abated in the event that a licensee files a timely challenge to the suspension or revocation in accordance with the procedures of this Article or upon an order of a court of competent jurisdiction. A suspension or revocation already in effect, but not previously challenged in a suspension or revocation hearing, may be challenged in the same manner but is not abated during the proceedings.

(b) Hearing on suspension or revocation. When a licensee files a written response and notice of intent to challenge a pending or existing suspension or revocation then a public hearing to determine if the pending suspension or revocation will become effective and final shall be held by the City Commission. The City Manager or his designee shall notify the City Attorney and any appropriate City offices who shall schedule and provide notice of the hearing date and time.

(1) The suspension or revocation hearing shall be held within thirty (30) days of the City Manager's receipt of a written challenge and request for a hearing by the aggrieved licensee.

(2) The participants before the City Commission shall be the licensee, any witnesses of the licensee, the City Manager or his designee and any witnesses of the City Manager or his designee. All witnesses shall provide their legal name, mailing addresses and telephone number.

(3) The procedures used shall be those typically used in a civil case with the City Manager or his designee having the burden of proof by preponderance of the evidence.

(4) Testimony and evidence may be submitted by any witness but shall be limited to matters directly relating to the grounds for suspension or revocation. Irrelevant, immaterial, or unduly repetitious testimony or evidence shall be excluded.

(5) All testimony shall be under oath. The City Commission shall decide all questions of procedure and standing. Unless otherwise mutually agreed to between the licensee and the City Manager or his designee, the order of presentation of testimony and evidence shall be as follows:

a. The City Manager or his designee and any witnesses of the City Manager or his designee.

b. The licensee and any witnesses of the licensee.

c. Rebuttal witnesses from the City Manager or his designee.

d. Rebuttal witnesses from the licensee.

e. Summation by the City Manager or his designee.

f. Summation by the licensee.

(6) The City Commission may also call and question witnesses or request additional evidence as the City Commission deems necessary and appropriate.

(7) To the maximum extent practicable, the hearing shall be informal. Reasonable cross examination of witnesses shall be permitted, but questioning shall be confined as closely as possible to the scope of direct testimony.

(8) If the City Commission comes to believe that any facts, claims, or allegations necessitate additional review or response by either the licensee or the City Manager or his designee, then the City Commission may order the hearing continued until an announced date certain, not to exceed thirty (30) days from the date of continuance. The City Commission shall render a final decision on the appeal within sixty (60) days of the City Manager's receipt of licensee's written notice of challenge.

(9) The City Commission shall render a written decision determining whether the suspension or revocation will become or remain effective at the conclusion of the hearing at which the appeal is decided or as soon as practicable thereafter.

(c) Filing of decision. The original of the written decision of the City Commission shall be filed with the City Clerk and copies shall be delivered or mailed to the licensee, the City Manager or his designee and the City Police Department.

(d) Judicial Review. Any person who participated in a suspension or revocation hearing before the City Commission and who is aggrieved by the decision of the City Commission may immediately challenge the decision in

any court of competent jurisdiction pursuant to the Rules of Procedure of that court. The record of the hearing shall consist of the complete record of the proceedings before the City Commission. The City Commission's decision shall be promptly reviewed by the court.

(e) Requirement of exhaustion procedures. Judicial review of a suspension or revocation, or related hearing or appeal proceedings, shall be available only after the administrative procedures and remedies set forth in this Section have been exhausted.

(f) Notice of final suspension or revocation. If no response or request for a suspension or revocation hearing is filed within 15 days of the notice of a pending suspension or revocation, or if the licensee who requested the hearing does not appear at the suspension or revocation hearing after notice, or if the City Commission decides after a hearing that a pending suspension or revocation will become final, then the City Manager or his designee shall issue to the licensee notice of final suspension or revocation of the adult entertainment license and mail or arrange delivery of the notice to the licensee's record address.

(g) Effective date of suspension or revocation. The suspension or revocation of a license shall take effect the day after delivery of a notice of final suspension or revocation to the licensee in person, by posting on the licensed establishment, or by mail to the licensee's record address, or on the date the licensee surrenders the license, whichever happens first. The licensee shall immediately return and surrender a revoked license to the City Manager or his

designee or surrender the revoked license, upon demand, to a member of the Police Department.

(Ord. No. 99-934, § I, 6-7-99)

APPENDIX G

IN THE CIRCUIT COURT
EIGHTEENTH JUDICIAL CIRCUIT
SEMINOLE COUNTY, FLORIDA

SEMINOLE ENTERTAINMENT, INC.,
d/b/a RACHEL'S,

Petitioner, CASE NO.: 0123AP

v.

CITY OF CASSELBERRY, FLORIDA,

Respondent.

SEMINOLE ENTERTAINMENT, INC.'S
COMPLAINT/PETITION FOR WRIT OF CERTIORARI
DIRECTED TO THE CITY OF CASSELBERRY

TO: HONORABLE JUDGES
CIRCUIT COURT
EIGHTEENTH JUDICIAL CIRCUIT
301 N. PARK AVENUE
SANFORD, FLORIDA 32771

The Petitioner, **SEMINOLE ENTERTAINMENT, INC.**, through its undersigned legal counsel, respectfully petitions this Court pursuant to Fla.R.Civ.P. 1.630, to issue a Writ of Common Law Certiorari to review the decision of the Casselberry City Commission (hereinafter "the city" or "the commission") revoking Seminole Entertainment, Inc.'s (hereinafter "Rachel's" or "Seminole Entertainment, Inc.") adult entertainment license.

I

BASIS FOR INVOKING JURISDICTION

This Court has jurisdiction to issue a Writ of Common Law Certiorari pursuant to Article V, Section 5(b), Fla. Const. and Fla.R.Civ.P. 1.630. The city's revocation order (and the underlying process) constitutes a clear departure from the essential requirements of law and is constitutionally infirm. *Haines City Community Development v. Heggs*, 658 So.2d 523 (Fla. 1995); *Tomeu v. Palm Beach County*, 430 So. 2d 601 (Fla. 4th DCA 1983); Article I, Sections 2, 4 and 9, Florida Constitution.

II

RELIEF SOUGHT

The petitioner would request the following relief from the court:

A. That the court issue an order directed to the City of Casselberry to show cause why the petitioner's complaint should not be granted;

B. That Seminole Entertainment, Inc. be allowed a reasonable period of time to file a reply to any response submitted by the city;

C. A final order – writ of certiorari directed to the city vacating or requiring the city to vacate its order revoking Seminole Entertainment, Inc.'s adult entertainment license.

III

APPENDIX DOCUMENTS

In support of its petition, Seminole Entertainment, Inc., is submitting under separate cover the following materials:

App. A Casselberry Code of Ordinances, Article III, Sections 14-66 through 14-114

App. B Notice of Revocation dated November 10, 2000 and Amended Notice

App. C Challenges to Revocation dated November 21, 2000

App. D Motion to Disqualify

App. E Supplemental Motion to Disqualify

App. F Resolution #95-19 reference ex parte communications, City of Casselberry

App. G On-Line Excerpt from *The Orlando Sentinel*, published November 5, 2000

App. H Political Advertisement for the Re-Election Campaign of Bruce Pronovost

App. I Transcript dated April 7, 1997, "Public Hearing II. Second and Final Reading of Ordinance 97-884"

App. J Deposition Transcript of Deponent Bruce Pronovost dated August 17, 1998

App. K Deposition Transcript of Deponent Jack Schluckebier dated August 17, 1998

App. L Deposition Transcript of Deponent Jack Schluckebier dated May 28, 1997

App. M Article published in the *Orlando Sentinel* titled "Casselberry official wore wire in probe of club owner"

App. N Deposition Transcript of Deponent David Henson dated September 23, 1997

App. O Transcript dated December 14, 2000, "Motion to Disqualify, Motion to Continue and Challenge to Revocation"

App. P Transcript dated December 27, 2000, "Hearing on Rachel's Challenge to Revocation of License"

App. Q Transcript dated December 28, 2000, "Hearing on Rachel's Challenge to Revocation of License"

App. R Transcript dated January 9, 2001, "Hearing on Rachel's Challenge to Revocation of License"

App. S Transcript dated January 16, 2001, "Hearing on Rachel's Challenge to Revocation of License"

App. T Notice of Final Revocation of Adult Entertainment License

App. U Letters to City Commission urging revocation of Rachel's adult entertainment license

App. V Index to Rachel's License Hearing Exhibits

App. W Application for Adult Entertainment License and Adult Entertainment License

App. X Affidavit for Arrest. Warrants (Hearing Exhibit 8)

App. Y Credit Card Receipts

IV

STATEMENT OF THE FACTS

On November 10, 2000, the city of Casselberry, through its city manager, served Seminole Entertainment, Inc. with a notice of revocation of its adult entertainment license. The notice is generic in nature and rather than specifying the specific criminal acts which formed the basis for same, it simply regurgitates *stock* language from the city's adult entertainment code. For a copy of the code, see **Appendix** (hereinafter "App.") **A**, §14-92(c) 3, 4, and 6. The notice reads in part:

1. The city manager has determined that the licensee or a person on its behalf or a person listed on the application pursuant to Section 14-80(b) of this article has knowingly[1] allowed possession, use, or sale of controlled substances on the premises of the establishment or business or when with a customer.

2. The city manager has determined that the licensee or a person on its behalf or a person listed on the application pursuant to Section 14-80(b) of this article has

---

[1] One of Rachel's challenges is that the city code allows an adult entertainment license to be revoked if a worker at the establishment "knowingly" allows certain criminal acts to occur – even though there is a lack of actual knowledge or, at a minimums, culpable negligence on the part of the licensee. The court will note in reviewing the application (**App. W**) that Rachel's ownership is required to list every worker at the establishment including entertainers. Under the verbiage used in the city code, if one of these dancers "knowingly" allows the commission of a criminal act, Rachel's license can be revoked. On this ground alone, the city code denies due process and constitutes an unlawful prior restraint.

knowingly allowed prostitution on the premises of the establishment or business or when with a customer.

3. Except in the case of an *adult motel*, the licensee or any person on its or his behalf or any person listed on the application pursuant to Section 14-80 of this article has knowingly allowed any specified sexual activities to occur on the premises of the establishment or business.

See **App. A** (Emphasis added).

The city amended its notice of revocation making some technical changes including changing the date that Rachel's had its license renewed from October 1, 1999 to October 1, 2000. See **App. B**. Rachel's filed a letter challenging same. See **App. C**.

Rather than appointing an independent hearing officer to hear the allegations against Rachel's, Casselberry's adult code provides that the city commission presides over revocation proceedings.[2] Because of the political posture and tenor of these proceedings, as well as evidence of bias on the part of the Casselberry officials, Seminole Entertainment, Inc. had a well-founded fear that it would not be treated fairly by the city commission. As such, a sworn motion to disqualify the commission was filed. See **App. D**. Thereafter, Rachel's filed a supplement to its motion to disqualify. See **App. E**.

As presented at the December 14, 2000 hearing, the evidence and sworn testimony supporting the motion

[2] These proceedings are quasi-judicial in nature and do *not* involve any legislative function – thus, entitling Rachel's to due process of law.

revealed the following. In an *Orlando Sentinel* article which appeared on November 5, 2000, Casselberry's mayor made the following statements.[3]

> However, *the strip bars with all their money, and corrupting influence*, continue to negatively impact our community. We should focus on improving our standards, . . .
>
> * * *
>
> My vision of Casselberry is a community that has redefined itself. By focusing on improving our neighborhoods, we can encourage citizen participation and involvement. This redefinition includes shedding our past image of being the adult entertainment capitol of Central Florida.

See **App. G** (Emphasis added).

It should be remembered that the mayor was embroiled in a contested election prior to the initiation of revocation proceedings against Rachel's (November 7, 2000 election). During this election, the mayor ran on a platform involving "Strict enforcement of the illegal activities going on inside the strip bars." See **App. H**. Obviously, the mayor's advertisement presupposed that illegal activities were occurring inside these so-called "strip bars."

Additionally, the following statements appeared in another advertisement/article that appeared on the mayor's campaign website.

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[3] In this case not only did the mayor (a non-lawyer) preside over the proceedings, but pursuant to a vote of the city commission, he ruled upon all legal objections raised by Rachel's – the overwhelming percentage of same were overruled.

> And, of course, there was the ongoing battle over adult entertainment. Clubs proliferated. All-night bars have become a draw. The city had developed a reputation as Central Florida's hot spot for nude dancing. The city took it on the chin.
>
> * * *
>
> Elected officials have brought adult entertainment under control. Strong leadership provides the framework for such a turn around. Casselberry mayor Bruce Pronovost has delivered that leadership.

See **App. H**.

Rachel's also tendered a transcript from an April 7, 1997 hearing showing the historical and political antagonism between Rachel's ownership, the mayor and city politicos. At that hearing, the mayor made the following statements.

> Well, I'll tell you who came to me originally. **It was a man by the name of Jim Veigle**. Jim Veigle was, I don't know what the correct legal term is, but he's certainly the controlling person over at Puzzles, also the controlling person over at *Rachel's*, the adult entertainment. The question that was raised here tonight was also very important with respect to adult entertainment, is community standards. It's obvious that if this ordinance was approved either by this city commission, or if put before the vote of the city of Casselberry, this would certainly lower the city of Casselberry's community standards. And what does that mean? What is our community standards mean? Well I dare say that if our community standards are in fact lowered, then it will be open season in the city of Casselberry. **I have to**

> **also take a look and prior to this whole issue coming before us, our own police had an investigation. *In that investigation*[4] that started out at Puzzles and spilled over into Rachel's, there are arrests made and there are signed affidavits that talk about a number of different things. The proliferation of drugs. High level staff at the establishments getting involved. Talking about under-aged, forced under-aged drinking, talking about forced prostitution**, and the question I always have to keep coming back is how is this good public policy to establish a precedent and a monopoly for two former all-night clubs?
>
> * * *
>
> **I've said it before, the strategy has been to confuse, to intimidate, to divide and to conquer.** I'm not confused. I will not be intimidated. I do believe that the city of Casselberry will come together and not be divided, and the city of Casselberry will not be conquered.

See **App. I**. (Emphasis added).

In an August 17, 1998 deposition in the case of *State v. Wisenthal, et al.*, the mayor refused to answer whether he had made public statements regarding forced prostitution at Rachel's.

> Q. Well, have you not made public statements that there's forced prostitution going on at Rachel's?

---

[4] This "investigation" was also a subject of discussion during the instant revocation proceedings. See pp. 27-31, infra.

A. I don't recall.

See **App. J** at 16.

The mayor ultimately conceded that he had read reports regarding alleged criminal activity at Rachel's.

Q. Anyway, the affidavits that you reviewed, did the affidavits – the signed affidavits include allegations of under-aged drinking and forced prostitution?

A. I do recall some discussion about under-aged drinking and specifically that girls could not refuse drinks.

Q. Did you specifically see any information regarding forced prostitution.

A. I don't recall.

Q. How about any information regarding proliferation of drugs at *Rachel's* or any other establishment?

A. Yes.

App. J at 17. See also, page 27 (Emphasis added).

The mayor was also approached by Florida state legislator Bob Starks reference closing down the adult clubs in Casselberry.

A. Bob Starks is an elected official and I've talked to him on various issues.

Q. Has he ever asked about closing down the adult entertainment establishments in Casselberry?

A. **Yes.**

* * *

Q. What did he ask you about adult entertainment in Casselberry?

A. He's asked me what are we doing about, you know, the seediness of 17-92, something to that effect.

App. J at 30.

In its sworn motion, Rachel's also alleged that the city manager had discussions with the city commission about issues involving adult entertainment and criminal investigations involving Rachel's.

Q. Have you discussed adult entertainment issues with any of the commissioners individually?

A. I'm sure I have.

Q. Which commissioner?

A. Probably all of them.

App. K at 32. See motion to disqualify and discussion infra at pp. 27-31.

Per Casselberry's adult code, the city manager was the individual charged with the responsibility to prosecute Rachel's for the alleged revocation violations. Therefore, it is pertinent to note that the city manager's relationship with two of Rachel's principal owners had become so hostile that he no longer spoke with either one of them.

Q. How would you describe your relationship with Jim and Charlie Veigle?

> A. I think it was fine until they leveled some allegations at me and I haven't really spoken with either one since that I know of, . . .

App. K at 39.

Similarly, it was alleged that in 1997 the city manager had "[v]erbally informed every member of the Casselberry City Commission that there was an investigation into illegal activities at Rachel's." See **App. D**. Support for this assertion is also found in the sworn deposition testimony of the city manager in *Time Traveler's Inc. v. City of Casselberry*. This issue was also discussed at the revocation hearing, infra at 27-31.

The sworn motion also provided that the city manager had "on one or more occasions advised and/or sought to influence one or more Casselberry city commissioners on the very matter [revocation of license] to be addressed in this proceeding". See **App. D**.

The motion to disqualify also asserted that Commissioner David Henson (who also holds the post of vice-mayor) participated in an undercover investigation conducted by the police to collect evidence against one or more principals of Seminole Entertainment, Inc.

To further buttress its claim that Seminole Entertainment, Inc. had a reasonable fear of bias, consider the following:

> Commissioner Henson has had a number of conversations with people regarding alleged drug use and prostitution at Rachel's. These conversations include Lieutenant Joey Mulson of the Casselberry Police Department. Commissioner Henson also spoke with the city manager and he overheard comments made by mayor Pronovost.

> Commissioner Henson has also testified that Mr. Larry Wilder has witnessed sex acts at Rachel's. Additionally, Commissioner Henson has testified that his wife had witnessed illegal drug use at Rachel's and that he passed this information on to the city manager with a request to "check it out". He also questioned the city manager as to whether "we" were monitoring alleged sexual activity in limousine owned by Rachel's. These statements by Commissioner Henson and other testimony by him occurred during a deposition on September 23, 1997 in a case styled *Time Travelers v. City of Casselberry*.

See **App. D**.

Later it was confirmed in an *Orlando Sentinel* article that Commissioner Henson wore a hidden microphone in an attempt to prosecute one of Seminole Entertainment, Inc.'s principal owners.

> One of the city commissioners who will rule whether to shut down Rachel's nightclub because of allegations of prostitution, drug use and money laundering once wore a **hidden microphone** in an attempt to catch the club's principal owner in a bribery attempt.
>
> Commissioner David Henson acknowledged Friday that he served as a **confidential informant** for the City, County Investigative Bureau – the vice squad in Seminole County – during the 1996 investigation.

See **App. M** (Emphasis added).

A hearing on Rachel's motion to disqualify was held before the City Commission on December 14, 2000. **App. O**. The commission denied the motion with three of the

commissioners denying that they were biased against Rachel's. See **App. O** at p. 38. However, interestingly enough, Commissioner Clark made a statement expressing disapproval that Rachel's was attempting to disqualify the commission. "[A]nd it perhaps should have been done much earlier, rather than being more concerned about disqualifying us." See **App. O** at p. 17.

Despite the commissioners assertions that they could be fair, Rachel's request to question the commissioners regarding their knowledge of the case and potential bias was denied. See **App. O** at p. 21.

Rachel's moved to dismiss the charging document (the notice of revocation) because it merely referenced the code provisions that Rachel's allegedly violated – it did not provide any specifics that would allow Rachel's to properly defend and prepare itself for trial.

> In other words, we are here with a certain degree of history, but absolutely no idea what specific acts we're being charged with. This is not a proceeding where there is some sort of discovery that's permitted under the ordinance code of the city of Casselberry.
>
> In other words, we don't have an opportunity to take pretrial depositions and pursue other matters that can result in clarification.
>
> So here we are on the day of the hearing. **It's impossible to prepare**, because we don't know what we're defending against, other than some vague generalities.
>
> Somebody at sometime, somewhere, did something wrong, and one of our – somebody who can

> be deemed to be, the corporation, Seminole Entertainment, Incorporated, is to be held responsible for that. That's all we know. That's constitutionally just insufficient.

App. O at pp. 9-10 (Emphasis added).

The motion to dismiss was denied. See **App. O** at p. 19.

Prior to the hearing, Rachel's expressed concern that it could not cross examine the city's documents and that the city manager refused to provide a witness list or disclose the evidence to be offered against Rachel's.

> Mr. Thomas[5]: I spoke on the telephone with Mr. Kahn.[6] This was not done in writing. And Mr. Kahn, I believe, would acknowledge and correct me, but the conversation is, essentially, "I'm not trying to be coy, but I intend to use some, perhaps, depositions, perhaps some other transcripts." I believe he may have referenced some sort of other documentary evidence. Kahn, "but without meaning to be coy, **I'm not going to tell you who my witnesses are, because I don't have to. I don't have to list my documents for you.**"

App. O at pp. 48-49 (Emphasis added).

Rachel's motion to continue was denied. **App. O** at p. 51. In lieu thereof, the commission gave Rachel's one hour

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[5] Mr. Thomas and Mr. Sheppard represented Rachel's at the hearing.

[6] Mr. Kahn was the attorney representing the city manager who prosecuted the case.

to review the initial documents prior to the commencement of the hearing. Various objections were levied against the exhibits including that much of it was hearsay and was not germane to the proceedings.

Testimony of Michael J. Laney/Revocation Hearing

Mr. Laney is employed with the Seminole County Sheriff's Office. He was the assigned case agent in the investigation involving Rachel's. Laney first went undercover in January, 2000, and the investigation lasted six months. **App. O** at p. 77.His testimony included an explanation of Exhibit 8-a 200+ page affidavit[7]. Counsel for Rachel's objected to Laney's testimony because he was merely providing legal conclusions that certain individuals (acting on behalf of the licensee) "knowingly" allowed specified sexual activities to occur on the premises. At this point the commission voted to allow the mayor to hear and rule upon any objections. Apparently, in response to Rachel's objections, Commissioner Clark stated, "It's going to be real difficult for me to sit here and let him say anything, but I'll agree to that" **App. O** at p. 79. Mayor Pronovost overruled Rachel's objections. **App. O** at p. 81.

Laney stated that he saw Julie Meyers dance for two unknown persons and state "that feels good." Later he saw her pull her undergarments back under her dress and show her vaginal area to Laney. **App. O** at p. 83. On February 4, 2000, Laney stated that a dancer simulated

[7] An overwhelming percentage of this affidavit has nothing to do with the Casselberry nightclub. Further, it contains numerous references to hearsay statements.

oral sex over a police officer's groin area. He also testified regarding oral sex between girls and a discussion of sex shows in a limousine. Rachel's objections that much of this information was hearsay was overruled by the mayor. **App. O** at p. 86.

While testifying regarding events that occurred in April 2000, Laney prefaced his testimony by stating "I was *not* present during this time," and that he would "[r]ead you the information that I received." **App. O** at p. 97 (Emphasis added). Rachel's objected that this hearsay evidence was inadmissible. The mayor overruled the objection. **App. O** at pp. 97-99.

The city prosecutor, Michael Kahn, continually questioned Laney whether he knew that workers "knowingly" allowed possession or sale of a controlled substances on the premises. Objections were raised that Kahn was asking for a legal conclusion and there was an insufficient predicate for Laney to give such an opinion. **App. O** at. p. 103. The mayor summarily dispatched with the objection.

> Okay. That takes us now to the motion that we heard just prior to our break – the objection, I should I should say. And the objection was overruled. So I will ask Mr. Kahn to go ahead and continue.

App. O at p. 109.

Mr. Laney described drug transaction(s) that occurred at the nightclub, specifically the purchase of Ecstasy from Julie Myers[8].

At page 111 of the transcript, the city asked Laney about conversations involving another agent and individuals at the club. Again, a hearsay objection was raised, and again it was overruled.

Mr. Thomas: May I object to the gratuitous hearsay comments?

* * *

Mr. Thomas: Again, just to make my hearsay objection.

* * *

Mayor Pronovost: We'll allow the testimony.

App. O at p. 112.

After the objection was overruled, Laney regurgitated the hearsay evidence contained in the affidavit referenced at paragraphs 162 and 171.

Clearly, Commissioner Henson was listening attentively and wanted to make certain that the city presented a good case to revoke the license. Vice-mayor Henson made a number of interesting comments as it pertains to the admission of a credit card receipt.

Mr. Henson: **So let's make sure we get all our ducks in a row.** I've seen a

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[8] Again, much of this tracks the affidavit which was admitted into evidence. For a discussion of this document, see page 37, infra.

copy bandied about. It doesn't appear to be an original credit card receipt.

* * *

Mr. Henson: Let's make sure we understand what we're doing.

Mr. Kahn: I understand.

App. O at p. 119 (Emphasis added).

At that point, the hearing was adjourned. **App. O** at pp. 119-120.

December 27, 2000 Hearing – Continuation

On December 27, 2000 the hearing was reconvened and Laney's testimony resumed. Laney described an instance where he saw two females, Ms. Meyers and Ms. Lethig, engage in oral sex with one another. **App. P** at pp. 26-27. Again, Laney was asked to tell the commission what several individuals had told him, including Robert Rexroad and Frank Otero. When the hearsay objection was raised, the mayor asked for guidance from city attorney Donna McIntosh.

Mayor Pronovost: Any direction, madam attorney?

Ms. McIntosh: No. Other than it appears that he was – he didn't really tell us what he said he was just telling us. Of course, the conduct could be an admission against interest as a manager of this facility.

App. P at p. 30.

The mayor overruled Rachel's objection. **App. P** at p. 31.

Darin Terry and Robert Rexroad both identified themselves to Laney as the general manager of Rachel's. Laney also met, Jim Mulrenin. Rachel's objected that all of this information was irrelevant and waived by the city because it took the affirmative step of renewing Rachel's license in November, 2000 – *after* the alleged criminal episodes. The objection was overruled. **App. P** at p. 34. Hearsay after hearsay was admitted during these proceedings, and the objections were continually overruled. **App. P** at pp. 39-41.

To show how keenly Commissioner Henson was interested in the proceedings, he asked several questions of this witness.

> Henson: I don't want to assume anything. I want to make sure you're clear and I understand what you're talking about.

App. P at p. 48.

Cross Examination of Laney

On cross it was shown that the testimony regarding illegal activity involving Jim Mulrenin did *not* occur in Casselberry. These allegations stem from an investigation of the Rachel's in *Orange County*.

> Q. Did you observe him engage in any of the activities about which you've been testifying relating to dope, prostitution or specified sexual activity?
>
> A. Not at that location.

Q. So he has nothing to do with this particular case other than he happened to walk through the premises on one occasion?

(Objection omitted)

Q. Well, what did he have to do with this investigation as it relates to Rachel's –

A. The – as far as Mr. Mulrenin is concerned?

Q. – Rachel's on 436.

A. – I had no contact with him. His involvement was at the south location.

Q. Which is not even in Seminole County?

A. That's correct.

App. P at pp. 49-50 (Emphasis added).[9]

Further, Laney never had any contact with the owners/board members of Seminole Entertainment, Inc. – Charles Veigle, James Veigle, Nancy Voegtlin or Robert Kelley. **App. P** at pp. 50-52.

There were a total of six arrests for prostitution over the course and scope of the six month investigation. **App. P** at p. 53. When asked whether Laney had any information to show that the owners of Seminole Entertainment, Inc. had any knowledge of these activities, Laney refused to answer the question.

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[9] The court will note when it reviews the 200+ page affidavit (App. X) which the city relied upon to revoke Rachel's license that an overwhelming percentage of it does *not* involve the Casselberry Rachel's.

> That's going to be part of an ongoing investigation, and I'm not going to answer that at this time.

App. P at pp. 53-54.

Rachel's attorney moved for a continuance until the investigation was completed so that he could adequately confront the witness. Ms. McIntosh advised the mayor that the questions to Laney exceeded the scope of direct examination. Therefore, the mayor sustained the prosecutor's objection and permitted the witness not to answer the questions. **App. P** at pp. 54-56.

Clearly, Rachel's attorney, Mr. Sheppard, was distressed that the attorney for the city manager would make an objection and then the attorney for the city commission would come to his aid and advise the mayor to sustain it.

> Mr. Sheppard: I want to object to getting double-teamed here. Counsel for the city manager makes an objection and counsel for the board is arguing, and I never have an opportunity to respond. And that is denial of due process in and of itself.

App. P at p. 56.

Rachel's continued to object that there was no evidentiary exception for a so-called ongoing criminal investigation[10] which would allow a witness to refuse to answer

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[10] A review of Chapter 90 of the Florida Statutes reveals that no such evidentiary privilege exists in Florida law.

questions. The mayor continued to sustain the city prosecutor's objections – limiting cross examination. **App. P** at pp. 57-60.

Laney also refused to answer questions when asked if any of the owners of Rachel's had knowledge of drug transactions occurring on the premises. **App. P** at pp. 60-61. Once again, the commission's attorney, Ms. McIntosh, became an advocate for the prosecution, essentially telling Laney he did not have to answer the question.

> Mr. Sheppard: That isn't what he answered. Is your answer, none?
>
> Ms. McIntosh: He's not giving you any, and that's the answer.
>
> * * *
>
> Ms. McIntosh: No, But what he's saying is that, he's not going to testify as to if there's any evidence.

App. P at pp. 61-62.

Again, Rachel's objections were overruled by the mayor.

When asked whether the owners had knowledge of specified sexual activity, Laney again refused to answer the question. Again, the mayor overruled the objection. **App. P** at pp. 62-63. No one higher in the chain of command over Otero told Laney that Otero was in fact the manager. **App. P** at p. 65. When asked whether Otero was assisting law enforcement, Laney again refused to answer asserting the so-called ongoing criminal investigation privilege – which does not exist in the Florida evidence code. **App. P** at p. 66. Rachel's request to require the

witness to answer the question was overruled. The same question was posed and the same response was given regarding Mr. Rexroad. Again the mayor overruled the objection. **App. P** at pp. 67-68.

> Mr. Sheppard: Well, I guess my motion to compel him to testify is denied.
>
> Mayor Pronovost: Right.

App. P at p. 68.

The scenario continued to repeat itself with the witness refusing to answer questions. **App. P** at p. 69.

> Q. And then I'd ask the same question about Jennifer Sue Lethig?
>
> A. I refuse to answer that on the grounds of an ongoing investigation.
>
> Mr. Sheppard: Same Argument
>
> Mayor Pronovost: Same ruling.

App. P at pp. 69-70.

The theme repeated itself with Mr. Mulrenin. **App. P** at p. 73.

As for Julie Meyers, Laney could present no evidence that she was acting on behalf of anyone other than herself.

> Q. Do you have any evidence with respect to paragraph 377, that Julie Meyers was acting on behalf of anyone other than herself.
>
> A. No sir; I don't.

App. P at p. 74-75.

The city prosecutor raised an objection that the answer called for a legal conclusion. Counsel rephrased the question.

> Q. Do you have any evidence that she acted on behalf of anyone other than herself when she made the transaction?
>
> Mr. Kahn: Same objection.
>
> Mr. Sheppard: It's not what you opine. Just do you have any evidence?
>
> Mr. Kahn: Again, my objection is because the phraseology that it calls for a legal conclusion.
>
> Mayor Pronovost: Objection is sustained[11].

App. P at pp. 75-76.

The police never documented any involvement by the owners of Rachel's pertaining to the criminal allegations. No owners were ever arrested. **App. P** at pp. 78-79. Of greater importance, Laney conceded that to his knowledge no one above Otero and Terry knew that they took a tip involving prostitution.

> Q. To your knowledge, did any one in the chain of command above Otero and Terry know that they took a tip providing you, I guess with –

[11] Perhaps it is not surprising that the mayor would overrule Rachel's objections but would sustain objections raised by the city. Throughout the proceedings, Rachel's objections were routinely overruled. App. P at pp. 103, 124, 129, 135, 139 and 170.

A. Not to my knowledge.

App. P at p. 83.

At the end of Rachel's questioning, Commissioner Henson once again questioned the witness. **App. P** at pp. 87-88.

Testimony of Christine Gigicos

Ms. Gigicos is a police officer assigned to the Metropolitan Bureau of Investigation. She described sex acts which occurred between two female dancers. **App. P** at pp. 125-126. Ms. Gigicos also related an incident involving the purchase of drugs. **App. P** at p. 139. There was also a discussion with Mr. Otero reference [sic] prostitution and getting girls from Gigicos to engage in prostitution. Apparently, Ms. Gigicos was pretending to be the head of an escort service. **App. P** at p. 145.

Ms. Gigicos had no knowledge of any wrongdoing by James Veigle, Charlie Veigle, Robert Kelley or Nancy Voegtlin, and she had no idea if the owners knew about the credit card transactions dealing with drugs. **App. P** at pp. 217-218. She did provide some interesting testimony regarding one of the managers, Janice Royce. On one occasion, Agent Gigicos was informed by Darin Terry, a doorman employed by Rachel's, that he would be the "lookour for Agent Gigicos and her associates while they received a private performance in the VIP room at Rachel's. Mr. Terry was looking out for management, in particular Janice Royce, as well as other customers and bouncers. **App. P** at pp. 167-170, 201 and 215.

Ms. Gigicos testified that Janice Royce, the General Manager of Rachel's, terminated the employment of two

day shift dancers upon finding out that the two had engaged in oral sex in the establishment. **App. P** at p. 177. Ms. Gigicos was also aware that Jim Mulrenin was fired by the owners. **App. P** at p. 184. Ms. Gigicos did not know that Jennifer Lethig was fired on March 9.

Otero apologized to Gigicos for not spending more time with her – he was unable to do so because Janice Royce was on duty. Ms. Royce was the manager over Otero. **App. P** at p. 189. Agent Gigicos never witnessed any acts of prostitution or drug transactions occur in the presence of Janice Royce. Nor was Ms. Royce present during any "sex shows." **App. P** at p. 216.

Agent Gigicos interpreted statements by Rachel's employees that Ms. Royce was a "dragon lady" and a "hard ass" to mean that Ms. Royce strictly enforced the rules as to what the employees could and could not do. **App. P** at pp. 216-217.

At the end of Gigico's questioning, Commissioner Henson once again had to question the witness. **App. P** at p. 204-206. Clearly, Commissioner Henson was attempting to prejudice the proceedings and "convict" Rachel's.

> Commissioner Henson: Eighteen visits, a majority – what I'm trying to get a sense of – of the number of violations and how obvious they were to you.

App. P at p. 206.

Commissioner Henson's questions continued. **App. P** at p. 208-210.

> Commissioner Henson: So what you're saying, its possible that for one event, for lack of a

> better term, there could be five violations or ten violations per one event.

App. P at p. 209.[12]

Commissioner Henson again questioned the witness regarding whether the manger, [sic] Janice Royce, could see anything. **App. P** at p. 218-219.

Testimony of William Christensen

Mr. Christensen is employed as a police officer with the city of Casselberry. **App. P** at pp. 221-222. He witnessed two females, Melissa Zinkiewicz and Julie Meyers, have oral sex and digitally penetrate each other. **App. P** at p. 229. Ms. Meyers also attempted to unzip agent Laney's zipper during a private dance. Darin Terry offered to provide a condom to Laney if he wanted to have sex with Ms. Meyers. **App. P** at pp. 229-230. Mr. Christensen also testified about a discussion with Robert Rexroad involving a drug transaction. **App. P** at p. 247. He also stated that Frank Otero used a flashlight to illuminate a straddle dance that Sherry Allen performed for agent McGriff. **App. P** at p. 244-245.

Although there was testimony that Rexroad or Otero had knowledge of these acts, the testimony also revealed that these incidents were not condoned by Rachel's ownership or management. For instance, Christensen stated that none of these acts occurred in the presence of Jim or Charles Veigle, Robert Kelley or Nancy Voegtlin. Further,

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[12] It is worth repeating that Commissioner Henson previously wore a "wire" in an attempt to have one or more of Rachel's owners arrested.

in all of the incidents he described, someone was acting as a look-out – which reinforces the point that these events were not sanctioned by Rachel's.

Q. And, in fact, in all those instances someone was up there lookin' out for whomever, correct?

A. I'd have to refresh myself, but I would say almost everyone. Yes.

App. P at p. 250.

The person they were watching for was Janice Royce, the manager.

Q. And it was communicated to you that, in part, the person they were lookin' out for was Janice Royce, correct?

A. I wouldn't say on every incident, but on several. Yes.

Q. And there was an attempt to conceal from Ms. Royce what was occurring; would you agree to that? That was your observation?

A. That's what we were told. Yes.

Q. Time and time again, correct?

A. I don't know if I'd say time and time again, but there were several times. Yes.

App. P at p. 250.

* * *

Q. Did that give you the impression that there were acts occurring that were contrary to what Miss Royce would allow?

A. Yes.

Q. And whenever on occasion when Janice Royce would come to the area where specified sexual acts were occurring, those acts would stop, wouldn't they?

A. I can only say on two incidences [sic] do I remember that. But, yes.

App. P at p. 251.

As he did with the other witnesses, at the end of Christensen's testimony, Vice-mayor Henson had questions.

Commissioner Henson: And your knowledge of Casselberry's code are pasties in violation of the code?

App. P at p. 255.

Commissioner Henson and the other commissioners were in a hurry to finalize the revocation hearing.

Commissioner Henson: We're taking a lot more time than I anticipated.

App. P at p. 259.

* * *

Commissioner Sheppard: You know, there's another fact here we have to consider. **Those we represent, the citizens are looking for us to resolve this thing with some sense of urgency. They don't want it drawn out.**

App. P at p. 266. (Emphasis added).

* * *

> Commissioner Henson: I just don't want to drag this thing out to the next millennium.

App. P at p. 277.

December 28, 2000 Proceedings

On December 28, 2000, the city manager (the prosecutor under the code), Jack Schluckebier, testified. **App. Q** at p. 288. He serves at the pleasure of the city commission. In other words, the city commission is his boss. **App. Q** at p. 318.

Schluckebier related that there had been undercover investigations by both the city and a special task force against Rachel's over the past nine years.[13] **App. Q** at p. 290. He relayed that there was an investigation in the Summer of 1996, and there was a monitoring event in April 1998.[14] Schluckebier relayed that an attorney for Rachel's had requested audio recorded tapes involving the daily activity summary of officer Botechello (City of Casselberry) between the dates of May 16, 1996 and August 22, 1996. **App. Q** at p. 297. Schluckebier had discussions with law enforcement regarding the status of the "ongoing investigation" both before and after the arrests at Rachel's on July 20, 2000.[15]

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[13] This directly ties in to the city manager and the city commission's animus toward Rachel's ownership. See discussion, supra at 7-11.

[14] None of this information was disclosed in advance of the hearing and, more specifically, none of it was contained within the charging document/notice of revocation – in either general or specific terms.

[15] This is the same ongoing investigation that Rachel's was foreclosed from cross examining witnesses about.

The city manager then discussed the transcript of a hearing held before Judge Kirkwood – an Orange County Judge, Florida Ninth Judicial Circuit. **App. Q** at p. 301-303. Schluckebier was then provided a copy of Exhibit 9, the [Judge Kirkwood] transcript – even though it was not moved into evidence. **App. Q** at pp. 304-305. In deciding to revoke Rachel's license, Schluckebier also relied upon a revocation notice from the Division of Alcoholic Beverages & Tobacco.[16] **App. Q** at p. 306. The city manager believed that the evidence was sufficient to "[s]ecure convictions so in [his] mind, the threshold of the standard that I was using went beyond mere allegations."[17] **App. Q** at p. 307.

To further reinforce the illusory notion that Rachel's received due process, the city manager relayed that he provided a copy of Exhibit 9 (the transcript of the hearing held before Orange County Judge Kirkwood) to either Mayor Pronovost or Commissioner Henson – even though this exhibit was *never moved into evidence* and was not made part of the record for this court's review.

> Q. And you don't have the recollection of which city commissioner you distributed what's been marked as exhibit 9, the transcript of the hearing of the State of Florida, Office of Attorney General, reference Rachel's Men's Club et al., dated August 2, 2000?

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[16] This document was likewise marked as an exhibit but was not contained in the record of the proceedings.

[17] As stated in the body of this paper, *no convictions* were obtained or tendered to the commission.

A. I would be able to narrow it down to, I'm certain it was either mayor Pronovost or Commissioner Henson, but I don't remember which one.

Q. But you feel it was one or the other?

A. Yes sir.

App. Q at pp. 313-344.

Mr. Schluckebier could not remember whether he received this document from Mr. Kahn (the prosecutor) or from another source. **App. Q** at pp. 316-317. He also had a discussion with the mayor regarding **newspaper articles** addressing what was "going on" at Rachel's. **App. Q** at pp. 320-321 (Emphasis added).

A. Probably roughly in the same time as when he was reading in the newspaper that people were being arrested for illicit activities.

App. Q at p. 321.

When Rachel's attempted to question the city manager regarding the mayor's views on Rachel's and adult entertainment as contained in his campaign materials, the mayor sustained the prosecutor's objection. **App. Q** at pp. 331-333. Schluckebier also recalled statements in a transcript containing quotes by the mayor involving conversations he had with Seminole County's sheriff regarding Rachel's. The mayor expressed concern and alarm about the arrests that occurred at Rachel's and other establishments. Further, the city manager briefed the mayor on the undercover investigation that Rachel's conducted by the police officials. **App. Q** at pp. 339-340.

Commissioner Henson also questioned Schluckebier in the past about whether there was "abundant illegal activity" at Rachel's. **App. Q** at pp. 341-342. Schluckebier (previously) informed the Casselberry City Commission of the 1996 criminal investigation against Rachel's. **App. Q** at pp. 344-345. Apparently this is the same investigation that he testified formed the basis (at least in part) for the revocation action against Rachel's. See **App. Q** at pp. 290-295.

Schluckebier was aware that Commissioner Henson had participated in an undercover investigation to collect evidence in an attempt to prosecute one or more principals of Seminole Entertainment. Schluckebier knew this because Commissioner Henson told him so. **App. Q** at p. 346.

> A. I knew that he had a discussion somewhere along the way with someone at the county level about – since he knew some of the people involved at Rachel's, and since he had in the past been actually in attendance at Rachel's, would he agree to have a conversation with the principals.

App. Q at p. 345.

Henson also told him about allegations regarding drug use and prostitution at Rachel's. **App. Q** at pp. 346-347. When the city manager's attorney objected to the question, the mayor sustained the objection. **App. Q** at p. 348. When asked whether Commissioner Henson had made statements that his wife had witnessed illegal drug use at Rachel's, the mayor once again stepped in and sustained an objection preventing disclosure. **App. Q** at p. 348. A follow up question was asked whether Henson had asked that this information be passed on to the city manager and that he check it out. Once again, the mayor stepped in.

"Objection is sustained." **App. Q** at pp. 348-349. In the past, city police officers would take on extra duty assignments at Rachel's. **App. Q** at p. 357. In summation, Schluckebier reaffirmed that he had had discussions with members of the city commission regarding (purported) illegal activities at Rachel's.

> Q. Have you had any discussions with any other members of the city commission with respect to illegal activities at Rachel's other than the mayor and vice-mayor?
>
> * * *
>
> A. I think I – I've already affirmed statements that you read today and I'm certainly aware of those.
>
> Q. Are you aware of any others?
>
> A. No sir. **But I certainty might have had some.**

App. Q at p. 358 (Emphasis added).

Testimony of Cleveland Peters

The investigation against Rachel's in Casselberry started in March, 2000. **App. Q** at pp. 366-367. On two occasions, Peters used his credit card to get cash and then used the money to purchase drugs. The person involved in this transaction was Robert Rexroad. **App. Q** at p. 368. Through Rexroad, Peters would purchase drugs from Carlos Sanchez.[18] **App. Q** at pp. 369-370. He left Rachel's

[18] Mr. Sanchez is *not* employed by Rachel's.

and finalized the drug buy at a location in *Orange County*. **App. Q** at p. 370. Rexroad told Peters that he was the manager and the general manager. **App. Q** at p. 371. There was one other drug buy that occurred on July 12, 2000 when he was able to obtain cash with his credit card. **App. Q** at p. 372. It was during this time that Rexroad said, "well, I don't – I don't actually sell the drugs." **App. Q** at p. 371. Rexroad explained that Rachel's received ten percent for "running the credit cards". **App. Q** at p. 378. Peters did not know what Rexroad meant by that.

On March 9, 2000, Peters was taken by limousine from the Casselberry Rachel's to the Orange County Rachel's. The girls had sex with each other in the back of the limousine during the trip. **App. Q** at pp. 385-386. On April 27, 2000, two females, Julie Meyers and Melissa Zinkiewicz, had sex with one another upstairs at Rachel's. **App. Q** at p. 386. On each occasion, Peters paid the girls. **App. Q** at p. 387. The managers on duty were Bobby Rexroad and Frank Otero.

Peters was shown an easel and Commissioner Henson suggested that they just hand the laser point to him because "that might be helpful to him." **App. Q** at p. 389. The easel/diagram shows that there are stairs leading up to the second floor at Rachel's. Peters described the area in [sic] following manner.

> A. Okay. It would be over in this dark location, in this area right in here. (Indicating). That was the one on the second floor, was over in that – they – they moved the chairs around.

App. Q at p. 389.

Peters characterized Otero as a "low-level manager." **App. Q** at p. 398. Darin Terry was also considered lower management. **App. Q** at p. 398.

Peters then discussed manager Janice Royce and her reputation at the club.

> Q. It appeared – the reputation was that she appeared to be an enforcer?
>
> A. They just said she was hard. They didn't like her.

App. Q at p. 400.

Manager Danny Beers had the same reputation.

> Q. Well, you were told that he was a, "hard ass," were you not?
>
> A. Shawn Smith said he didn't like him; that he was different.

App. Q at p. 400.

Peters has never witnessed any illegal activity on the part of James Veigle, Charles Veigle, Robert Kelley or Nancy Voegtlin. **App. Q** at p. 402. Peters does not even know who these individuals are. When Rachel's attorney asked Peters whether they had any other evidence to tie the company into the drug transactions, the mayor sustained the prosecutor's objection. **App. Q** at p. 404. The only person that he was aware of that had knowledge of the drug transactions at the Casselberry club was Rexroad.

> Q. That's it, as far as your investigation revealed?
>
> A. Yes, sir.

App. Q at p. 405.

As for Carlos Sanchez, he is *not* employed by Rachel's. He has his own company. **App. Q** at pp. 405-406.

At the conclusion of Peters' testimony, Commissioner Henson had a number of questions. **App. Q** at pp. 408-413 and 416-418. The following is a sampling of Commissioner Henson's questions.

> Commissioner Henson: Did you witness violations of Casselberry's adult entertainment ordinance –
>
> * * *
>
> Commissioner Henson: Were managers present or – to your knowledge, did mangers observe violations of the Casselberry adult entertainment ordinance and were they in the proximity of you when that occurred?

App. Q at p. 417-418.

After closing arguments, Commissioner Henson wanted to know if he could reserve the right to request additional evidence later after he had reviewed what was available. **App. Q** at pp. 472-473.

January 9, 2001 Hearing/Commissioner Henson's Disqualification

On January 9, 2001 the city commission convened a hearing on the Rachel's case. At that time, vice-mayor Henson stated that he was the one who had received a copy of the hearing transcript (which was not moved into evidence) which is identified as Exhibit 9 on the index. See **App. V**. Henson explained that he had received this

transcript *prior* to the revocation proceedings being initiated. **App. R** at pp. 3-4. Although he disqualified himself, he continued to maintain that he could be impartial. **App. R** at p. 4.

It was also during this hearing that a number of disclosures were made by the city commission. Several letters were received by the commission. These letter [sic] reflect in part the-following.

> Dear Commissioners: **It is my hope that the City of Casselberry will do there best to rid their city and out** [sic] **county of clubs such as Rachel's**. It is demeaning to women and insulting to Christian people.
>
> * * *
>
> As a private citizen of Seminole County I appreciate what you're doing to combat the adult industry.
>
> * * *
>
> We have been following as have many other residents of Seminole County, the on-going proceedings relating to the unsavory goings on at that club.
>
> * * *
>
> We feel that this club is a detriment to the city as well as to the county. The citizens of Casselberry and Seminole County are closely watching the commission to see what transpires regarding this issue.

App. U (Emphasis added).

Commissioner Sheppard was also approached by Reverend John Book in an attempt to encourage "[h]im to vote in a measure that would, I think, restrict adult entertainment." **App. R** at p. 12. Commissioner Sheppard thought that he was just saying "hello" to Mr. Book. "All I thought we were doing was saying hello." **App. R** at p. 12. However, Reverend Book obviously thought different.

> Mr. Book: I never say hello on a subject like this that I don't try to influence.

App. R at p. 12.

Hearing January 16, 2001/Deliberations

On January 16, 2001 the city commission began its deliberations. During same, the commission stated that although the adult code states that the revocation need only be proven by a preponderance of the evidence, it would change the standard to clear and convincing evidence. Despite this assertion, there was never any statement showing exactly what the commission meant by clear and convincing evidence or whether they understood the concept. It was equally clear that the city commission also felt that Rachel's should be "convicted" because, in the commission's "mind", Rachel's did not disprove the allegations against it. The following quotes from two of the city commissioners support this assertion.

> Mr. Pronovost: We had half of that, a case presented by the city manager, **but the licensee chose to rest their case without presenting any evidence to substantiate their defense** and simply chose to rely on raising doubts

> on the evidence or the witnesses or punch holes in the city manager's case.

App. S at p. 14.

* * *

> *Defense provided no evidence* that these were in fact rogue employees; . . .

App. S at p. 23.

* * *

Ms. Hart: The sale and use of drugs, prostitution, and sexual activities on the premises were clearly evident and *not denied* by Mr. Sheppard, Rachel's attorney.

* * *

> In my opinion *nothing was presented* into evidence to prove the owners had no knowledge.

App. S at p. 9 (Emphasis added).

* * *

> I don't believe that enough evidence was provided to me *in support for Rachel's*, . . .

App. S at p. 11 (Emphasis added).

General Summary of City's 200+ page affidavit

A central focus of the revocation proceedings was a 231 page affidavit for arrest warrants. See **App. X.** It is

replete with irrelevant and multiple hearsay statements – all of which were not subject to cross examination by Rachel's.

Page 4 reflects that the Casselberry Police Department was conducting an investigation of Rachel's in 1996. This is the same investigation which the Casselberry City Commission was previously made aware of and which supported (in part) Rachel's motion for disqualification. Pages 4 through 6 contain hearsay statements of Jason Rarick who did *not* testify at the hearing. Furthermore, Rachel's was not put on notice of any of this information since it was not referenced in the notice of revocation. An additional hearsay statement of Jay Lewis appears at page 7 of the affidavit. Statements from Julie Meyers and Jennifer Lethig are referenced at page 11. At page 32 the affidavit states that a manager identified as Janice Royce caught two day shift dancers engaging in oral sex upstairs and "threw the dancers out of the business".

Because this affidavit contains hearsay upon hearsay, Rachel's attorneys repeatedly objected to it. **App. R** at p. 439.

From pages 25 through 37 there is a typed version of an audiotape (not subject to confrontation, review or moved in to evidence) which references statements between two individuals discussing sex and a limousine driver. However, none of these actions or discussions occurred at Rachel's.

Pages 37 through 42 discuss actions which occurred at **Rachel's South** in *Orange County*. At page 42 the affidavit references a discussion with an individual regarding a drug transaction – but again, none of this occurred at Rachel's. Page 43 the affidavit references a telephone

discussion between a police agent and Julie Meyers – but again, none of this occurs at Rachel's.

At page 46, paragraph 170, Darin Terry references that it is not his job to make the dancers dance on boxes, it is really the manager's job. At page 49, paragraph 187, there is a hearsay statement from Frank Otero stating that there is no upstairs at Rachel's South "[s]o that kinda eliminates that."[19]

Pages 49 through 52 involve incidents at **Rachel's South** in Orange County.

Page 52, paragraph 202, states that two agents entered the business but there is no description of whether it is Seminole or Orange County. Page 54 et seq. involve activities and conversations which occurred at **Rachel's South**, *Orange County*. Page 57 references a hearsay statement from agent Cynthia Sherman which again references **Rachel's South**, not Casselberry. Page 59 references telephone conversations that did not occur at Rachel's.

Page 60, paragraph 234, again references the Orange County Rachel's location – also known as **Rachel's South**. The discussions at page 61, paragraph 238, focus upon the Orange County location. Page 61 through 68 reference **Rachel's South**-Orange County. Page 68 references activity that occurred in a limousine and not on the Rachel's premises. At paragraph 276 there is a reference that someone came into the upstairs area of Rachel's

[19] The implication is that these activities had to be done in secret.

North and the dancers stopped their sexual activity. One of the dancers left and hid in the dancers' dressing room.

Pages 71 through 73 reference incidents at **Rachel's South**. Page 73, paragraph 297, references events that occurred in a limousine in Orange County, Florida. Pages 74 through 85, starting with paragraph 304, again discuss **Rachel's South** – none of which is pertinent to the revocation claims levied against the Casselberry Rachel's.

Pages 88 through 103 reference the **Orange County Rachel's**. The bottom of page 99 the discussion focuses upon a limousine ride which does not involve Rachel's Casselberry. Pages 109 through 111 reference the **Orange County Rachel's**.

At page 111, paragraph 399, Frank Otero made a statement that Janice Royce is the "overall person in charge." Paragraph 399 references that former manager Jim Mulrenin was fired.

Pages 112 through 117 reference **Rachel's South**, Orange County. Pages 117 through 120 reference events that occurred in a limousine – *not* at the Casselberry Rachel's. Pages 120 through 121 discuss telephone conversations. Pages 121 through 131 reference **Rachel's South**, Orange County. Pages 132 through 134 reference Orange County and a limousine ride. Pages 134 through 140 reference a telephone conversation. Pages 140 through 142 reference a telephone conversation between agent Peters and Bobby Rexroad of Rachel's South. Pages 143 though 171 reference **Rachel's South**, Orange County. Pages 171 through 193 reference Orange County, a limousine ride and telephone conversations – again, none of which is germane to the Casselberry proceedings.

Pages 197 through 201 discuss a limousine ride where Carlos Sanchez (not an employee of Rachel's) arrived at the Radisson Hotel and entered a limousine with agents Peters and Sherman.

At page 204, paragraph 536, it is reported that two dancers stopped what they were doing when they were warned that "Janice Royce was in the area" . . . At page 204, paragraph 539, there is a reference that "[I]t should be alright when Janice Royce leaves." Pages 207 through 208 reference a telephone conversation to Darin Terry, apparently at his home. At page 210, paragraph 568, there is another reference to Janice Royce being downstairs in the main stage area and, therefore, it was alright to continue with the activities.

At paragraph 569 there is another reference to the intolerance of Janice Royce to criminal activity.

> Darin Terry stated, "Sit down, because when you're standing there is guy over here with a girl and he's friends with her", meaning the subject was friends with Janice Royce.

Page 212 references a telephone call to Frank Otero's cellular telephone. At page 214 there is a reference to a telephone call made to Carlos Sanchez's cellular telephone. Page 214-215 references **Rachel's South**. Pages 216 through 225 reference a conversation that occurred in Carlos Sanchez's limousine. Mr. Sanchez is *not* an employee of Rachel's. Page 225 to 226 references surveillance of Carlos Sanchez. Pages 226 through 227 reference **Rachel's Orange County**.

Considering the irrelevant, highly prejudicial and hearsay nature of this voluminous document, it never should have been admitted into evidence during the

revocation proceedings. On this ground alone, the revocation order should be set aside.

V

LEGAL ARGUMENT

The petitioner should succeed on the merits for at least the following reasons, to-wit:

a. Seminole Entertainment was denied its right to a neutral, unbiased and detached fact finder as manifested by the plethora of evidence that the Casselberry City Commission was biased against "Rachel's" and so-called "adult entertainment" in general.

b. Sections 14-92 and 14-93, Casselberry City Code and the Hearing process "afforded" the Plaintiff, denied Seminole Entertainment Inc. substantive and procedural due process as guaranteed by Article I, Section 9 of the Florida Constitution.

c. The revocation was improperly and unlawfully entered in that no evidence was tendered to the city commission establishing that Seminole Entertainment, Inc.'s ownership had actual knowledge or was culpably negligent in failing to stop or deter the alleged criminal improprieties which the city relied upon in revoking the Plaintiff's adult entertainment license. Further, the code unlawfully allows the revocation of an adult license based upon the criminal activity of a worker without proving complicity or actual knowledge of the licensee/owner.

d. The Casselberry City Code vests unbridled and unfettered discretion with the city commission to determine whether a license should be revoked or suspended

based upon the same (alleged) criminal conduct. As such, the City Code, Sections 14-92 and 14-93, and the City's revocation order constitute an unconstitutional prior restraint in violation of Article 1, Section 4 of the Florida Constitution.

e. The city relied upon the wrong (and de minimis) standard of review specifically preponderance of the evidence and further improperly and unlawfully shifted the burden of proof to Seminole Entertainment, Inc. to establish that its adult entertainment license should not be permanently revoked.

f. The Casselberry Adult Entertainment Code does not provide "prompt judicial review" when the city permanently revokes an adult entertainment license nor does it provide a "stay" or abatement of the license revocation pending review and decision by the court.

Each of the foregoing will be argued separately below.

(a)

SEMINOLE ENTERTAINMENT WAS DENIED ITS RIGHT TO A NEUTRAL, UNBIASED AND DETACHED FACT FINDER

As reflected by the hearing transcripts and documents filed with this court, Seminole Entertainment, Inc.'s adult entertainment license was suspended by the Casselberry City Commission after a quasi-judicial hearing. At the outset one of the fatal flaws in this process was the city commission's determination to not only sit as the fact finder in this case, but further its pre-determination to revoke the Plaintiff's license.

Prior to the hearing, Seminole Entertainment, Inc. filed a sworn motion to disqualify which set forth numerous factual allegations and it further tendered a number of documents supporting its claims that the mayor and the Casselberry City Commission did not constitute a fair and unbiased forum to litigate the revocation action. The factual statements and assertions raised by Seminole Entertainment, Inc. were legally sufficient and would place a normal and reasonable person in fear of not receiving a fair hearing. Further, not only did the city commission ultimately deny the motion to disqualify but it challenged the truth of the allegations by repeatedly asserting (in a self-effacing manner) that it would be fair and impartial. However, the two commissioners who refused to address the allegations were vice-mayor Henson and mayor Pronovost, who stood silent.

In support of the petitioner's position that it was denied its right to a neutral, unbiased and detached fact finder, see *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) (impartial decision maker essential to due process]; *Ward v. Monroeville*, 409 U.S. 57 (1972) (due process violated where mayor presided over traffic offenses and held responsibility for village's finances]. In *Jennings v. Dade County*, 589 So.2d 1337 (Fla. 3rd DCA 1991), the court held that due process was implicated based upon ex parte communications with the Dade County Commission while acting in a quasi-judicial capacity. Further, Judge Ferguson in concurring made the following instructive comments.

> Ex parte lobbying of an administrative body acting quasi-judicially denies the parties a fair, open, and impartial hearing. (Citation omitted) Adherence to procedures which insure fairness

> "is essential not only to the legal validity of the administrative regulation, but also to the maintenance of public confidence in the value and soundness of this important governmental process." (Citation omitted) **The constitutional compulsions which led to the establishment of rules regarding the disqualification of judges apply with equal force to every tribunal exercising judicial or quasi-judicial functions.** 1 Am. Jur. 2d Administrative Law §64, at 860 (1962); *City of Tallahassee v. Florida Pub. Serv. Comm'n*, 441 So.2d 620 (Fla. 1983) (standard used in disqualifying agency head is same standard used in disqualifying judge), (remainder of citations omitted).

Jennings at 1345 (Emphasis added).

See also, e.g., Cherry Communications, Inc. v. Deason, 652 So.2d 803, 805 (Fla. 1995) [in license revocation proceedings an impartial decision maker is a basic constituent of minimum due process]; *Pelham v. School Board of Wakulla County*, 451 So.2d 1004 (Fla. 1st DCA 1984) [ordering members of the school board disqualified from participating in a hearing because Plaintiff showed a "well-grounded fear that he will not receive a fair [hearing] at the hands of the [respondent agency]"]; *National Labor Relations Board v. Phelps*, 136 F.2d 562 (5th Cir. 1943) [finding "a fair trial by an unbiased and nonpartisan trier of facts is of the essence of the adjudicatory process as well when the judging is done in an administrative proceeding by an administrative functionary as when it is done in court by a judge," and that respondents had been denied a fair trial due to the impartiality of the examiner]; *R. C. Wall v. American Optometric Ass'n, Inc.*, 379 F.Supp. 175 (N.D. Ga. 1974) [finding that bias of

members of the board violated plaintiffs right to obtain a fair hearing and the "role which the board must inevitably play in the process is sufficient to infect the process with substantial unfairness"]. See *Livingston v. State*, 441 So.2d 1083, 1085 (Fla. 1983) [when presented with a motion for disqualification, "if predicated on grounds with a modicum of reason, the judge against whom raised, should be prompt to recuse himself. No judge under any circumstances is warranted in sitting in the trial of a cause whose neutrality is shadowed or even questioned"]; *Franco v. State*, ___ So.2d ___ (Fla. 4th DCA 2001) [2001 Fla.App. Lexis 823] [court's comments manifesting dislike of attorney warranted disqualification]; *Coucher v. Licht*, 731 So.2d 835 (Fla. 5th DCA 1999) [writ of prohibition granted where judge had prejudged the credibility of witnesses]; *State ex rel. Allen v. Board of Public Instruction of Broward County*, 214 So.2d 7 (Fla. 1st DCA 1968) [ordering rule nisi in prohibition be made absolute due to bias and prejudice of school board members, thereby prohibiting them from presiding over quasi-judicial proceedings affecting livelihood of individuals]; *The Tower Group, Inc. v. Doral Enterprises*, 760 So.2d 256 (Fla. 3rd DCA 2000) [acrimonious judicial campaign involving re-election opponent]; *Cammarata v. Jones*, 763 So.2d 552 (Fla. 4th DCA 2000) [trial judge's suggestions warranted well-founded fear]; *Stockstill v. Stockstill*, 770 So.2d 191 (Fla. 5th DCA 2000) [trial judge's questioning of witness warranted removal]; *Royal Caribbean Cruises, Ltd. v. Jane Doe*, 767 So.2d 626 (Fla. 3rd DCA 2000) [judge's remarks suggested pre-existing unfavorable opinions warranted disqualification].

(b)

SECTIONS 14-92 AND 14-93, CASSELBERRY CITY CODE AND THE HEARING PROCESS "AFFORDED" THE PLAINTIFF, DENIED SEMINOLE ENTERTAINMENT, INC. SUBSTANTIVE AND PROCEDURAL DUE PROCESS AS GUARANTEED BY ARTICLE 1, SECTION 9 OF THE FLORIDA CONSTITUTION

The Florida Supreme Court has defined the due process parameters of Article 1, Section 9 of the Florida Constitution in the following manner:

> The basic due process guarantee of the Florida Constitution provides that "no person shall be deprived of life, liberty or property without due process of law" Art. 1, Section 9, Fla. Const. Substantive due process under the Florida Constitution protects the fully, panoply of individual rights from unwarranted encroachment by the government. To ascertain whether the encroachment can be justified, courts have considered the propriety of the state's purpose; the nature of the party being subjected to state action; the substance of that individual's right[20] being infringed upon; the nexus between the means chosen by

[20] Here, the issue is Seminole Entertainment, Inc.'s constitutional right to freedom of expression. Seminole Entertainment, Inc. is being regulated and denied its right to offer erotic-striptease dancing as set forth within Casselberry's adult entertainment code. See Seminole Entertainment, Inc.'s application for an adult entertainment license, **App. W**, "adult performance establishment," (presentation of erotic dancing, exposure of specified anatomical areas, etc.] and Section 14-70, Casselberry Adult Entertainment Code. For cases addressing the constitutional protection afforded this type of entertainment, see page 60 infra.

> the state and the goal it intended to achieve; whether less restrictive alternatives were available; and whether individuals are ultimately being treated in a fundamentally fair manner in derogation of their substantive rights.

Department of Law Enforcement v. Real Property, 588 So.2d 957, 960 (Fla. 1991). See also, *Club Misty, Inc. v. Laski*, 208 F.3d 615, 617-618 (7th Cir. 2000) [discussion of interests involved in license revocation proceedings]. Further, because Casselberry's adult code is penal in nature (revocation of license), it must be strictly construed in favor of Seminole Entertainment. *Dyer v. Dept. of Insurance and Treasurer*, 585 So.2d 1009, 1013 (Fla. 1st DCA 1991) and cases cited therein.

The Casselberry City Code and the hearing undertaken in this case violated the petitioner's due process rights (both substantive and procedural) for at least the following reasons.

1. The notice and amended notice of revocation are insufficient as a matter of Florida law. See *J.C. v. State*, 630 So.2d 1187, 1189 (Fla. 2nd DCA 1994); *Chrysler v. Department of Professional Regulation*, 627 So.2d 31, 33-34 (Fla. 1st DCA 1993); *Conklin Center v. Williams*, 519 So.2d 38 (Fla. 5th DCA 1987). See also, *Burgess v. Storey County Board of Commissioners*, 992 P.2d 856 (Nev.2000) [revocation of license]. In this regard, the petitioner filed a motion to dismiss the city's amended notification of revocation. The motion to dismiss was denied.

2. The Casselberry Code does not provide the corollary right to subpoena witnesses and thus denies due process. See *Spiegel v. Lavis Plumbing Services*, 373 So.2d 72 (Fla. 3rd DCA 1979).

3. The revocation was improperly based upon irrelevant, highly prejudicial and inadmissible and overwhelming hearsay testimony. See *Florida Department of Administration v. Porter*, 591 So.2d 1108 (Fla. 2nd DCA 1992); *Campbell v. Central Florida Zoological Society*, 432 So.2d 684 (Fla. 5th DCA 1983); see also *Richardson v. Perales*, 402 U.S. 389 (1971) [no due process violation where right to subpoena witnesses available].

4. The petitioner was given insufficient time to prepare for the hearing, and more specifically was not provided notification of the specific allegations which formed the basis for the revocation action. The petitioner was not provided a witness list in advance of the hearing not was it given an opportunity to adequately conduct discovery and prepare for the hearing.

5. The petitioner was not given an opportunity to remedy the (alleged) criminal wrong doings at Rachel's prior to the city commission imposing the ultimate sanction, in this case revocation of its adult entertainment license. See *Health Clubs, Inc. v. Eagan*, 338 So.2d 1324 (Fla. 2nd DCA 1976); *Health Clubs of Jacksonville, Inc. v. Austin*, 381 So.2d 1174 (Fla. 1st DCA 1980); *City of Miami v. Keshbro*, 717 So.2d 601 (Fla. 3rd DCA 1998), rev. granted, 729 So.2d 392 (Fla. 1999).

6. The petitioner was denied its right to confront and cross examine its accusers. For instance, police witnesses refused to answer petitioner's questions asserting a so-called continuing criminal investigation privilege. The effect of this assertion was to deny the petitioner a fair hearing. On one hand the city presented witnesses who offered testimony that the city believed benefitted its cause but on the other hand, the city refused to allow the

petitioner to adequately confront and cross examine these same witnesses.[21] Further, on several occasions the city thwarted the petitioner's cross examination by claiming that its questioning was beyond the scope of direct examination. It is axiomatic that great latitude is given in cross examination and that the refusal to afford such broad latitude to explore bias or to clarify any points which were addressed during direct examination, constitutes reversible error. See *Young-Chin v. City of Homestead*, 597 So.2d 879, 881-882 (Fla. 3d DCA 1992); *Dempsey v. Shell Oil Company*, 589 So.2d 373, 378 (Fla. 4th DCA 1991).

7. The city's order of revocation does not comport with the requirements of Florida law. *Thomas v. Office of Sheriff*, 507 So.2d 145 (Fla. 1st DCA 1987).

(c)

THE REVOCATION WAS IMPROPERLY AND UNLAWFULLY ENTERED IN THAT NO EVIDENCE WAS TENDERED TO THE CITY COMMISSION ESTABLISHING THAT THE OWNERS OF SEMINOLE ENTERTAINMENT, INC. HAD ACTUAL KNOWLEDGE OR WERE CULPABLY NEGLIGENT IN FAILING TO STOP OR DETER THE ALLEGED CRIMINAL IMPROPRIETIES WHICH THE CITY RELIED UPON IN REVOKING THE PLAINTIFF'S ADULT ENTERTAINMENT LICENSE

Due process requires that the city prove that Seminole Entertainment, Inc. had actual knowledge or, at a minimum, was culpably negligent in failing to prevent the

[21] Plaintiff's objections were repeatedly overruled by the mayor.

alleged criminal activity from occurring at Rachel's. Record testimony reveals that these incidents were committed by a few rogue employees who concealed their actions from other personnel and managers at Rachel's and obviously to the exclusion of Seminole Entertainment, Inc. owners. These individuals used "look-outs" to make sure the wrong doing was not observed and further made concerted efforts to insure that the manager, Janice Royce, did not witness same as she would not tolerate such activity.

Q. Darin Terry went on to say on, March 2, in your presence, quote, that the last – best time to be here is Sunday when the lady manager, Janice Royce, is not here just Frank, end quote. Is that what he told you?

A. That's correct.

Q. Now, how did you interpret that?

A. That they – from previous conversations with Darin Terry – that Janice Royce was a real hard quote, unquote, ass at the – at Rachel's. She ran upstairs VIP.

Page 183, December 27, 2000 transcript, **App. P**.

The testimony also revealed that no prostitution or drug activity occurred in front of Janice Royce. See page 183-184, **App. P**.

Q. Can you testify that Janice Royce ever knew that such a show ever went on?

A. I believe she knew that it was going on. Yes.

Q. I understand you might believe that. But do you have any evidence to prove what you believe? Did you ever see her there when it was happening?

A. During the time the sex show was going on, no, sir.

Q. Now, the dancers referred to her as Dragon Lady –

A. Yes.

Q. – and Hard Ass?

A. Correct.

Q. And your understanding of what they were communicating in that regard was that she was strict about what they could and couldn't do?

(Objection omitted)

Q. Isn't that true, that that was your impression?

(Discussion omitted)

Q. Isn't it true that your interpretation of the reference to Janice Royce by the dancers that she was, quote, Dragon Lady, end quote, and Hard Ass, end quote, was that she strictly enforced some rules, prohibited some conduct?

A. That was probably part of the interpretation.

See page 216-217, December 27, 2000 Transcript, **App. P**.

Additional testimony from the police also indicated that these actions were not condoned nor did they occur with the knowledge of high-level management of Rachel's and certainly not to the knowledge of Seminole Entertainment's ownership.

Q. And, in fact, in all those instances someone was up there lookin' out for whomever, correct?

A. I'd have to refresh myself, but I would say almost every one. Yes.

Q. And it was communicated to you that, in part, the person that they were lookin' out for was Janice Royce, correct?

A. I wouldn't say on every incident, but on several. Yes.

Q. And there was an attempt to conceal from Ms. Royce what was occurring; would you agree to that? That was your observation?

A. That's what we were told. Yes.

Q. Time and time again, correct?

A. I don't know if I'd say time and time again, but there were several times. Yes.

See page 250, December 27, 2000 Transcript, **App. P**.

This testimony continued and established that manager Royce would not allow such acts to occur at Rachel's.

Q. Did that give you the impression that there were acts occurring that were contrary to what Ms. Royce would allow?

A. Yes.

Q. And whenever on occasion when Janice Royce would come to the area where specified sexual acts were occurring, those acts would stop, wouldn't they?

A. I can only say on two incidences do I remember that. But, yes.

See page 251, December 27, 2000 Transcript, **App. P**.

There is no competent evidence that any person committed any illegal acts while acting within the scope of authority of Seminole Entertainment or in any responsible relationship with Seminole Entertainment. Any illegal acts committed on or about the premises of Seminole Entertainment were done by individuals not acting on behalf of or for the benefit of Seminole Entertainment. No evidence was established that these purported violations occurred with Seminole Entertainment's actual knowledge or that it was culpably negligent in failing to stop same. Accordingly, there was insufficient evidence presented at the hearing upon which to base the decision of the City Commission. The evidence tendered provided that:

1. James Veigle, Charles Veigle, Nancy Voegtlin and Robert Kelly are the officers and directors of Seminole Entertainment, Inc.

2. On one occasion, Sergeant Laney purchased one tablet of MDMA, also known as ecstacy, for $25.00 from Julie Meyers, a dancer at Rachel's. No evidence was presented that dancers were employees of Rachel's. [**App. P**, page 39, lines 12-16]

3. During the course of his investigation, Sgt. Laney never observed James Paul Veigle involved in any acts of prostitution, drug possession, sale or use, or conduct in violation of the City of Casselberry Code of Ordinances. [**App. P**, page 51]

4. During the course of his investigation, Sgt. Laney never observed Nancy Lee Voegtlin involved in any acts of prostitution, drug possession, sale or use, or conduct in violation of the City of Casselberry Code of Ordinances. [**App. P**, pages 51-52]

5. During the course of his investigation, Sgt. Laney never documented any involvement of James Veigle, Nancy Voegtlin, Charles Veigle, or Robert Kelly in any acts of prostitution, drug possession, sale or use, or conduct in violation of the City of Casselberry Code of Ordinances. [**App. P**, pages 78-79]

6. On two occasions, Agent Ray Peters gave his credit card to Robert Rexroad in order for Mr. Rexroad to obtain a cash advance to purchase cocaine. On one occasion, Mr. Rexroad received a tip of $300.00 for obtaining a cash advance of $1,000.00. On this same occasion, a fee of 10% was also included for obtaining the cash advance. [**App. P**, page 368]. No evidence was presented that James Veigle, Nancy Voegtlin, Charles Veigle or Robert Kelly had any knowledge that cash advance fees received by the licensee were related to any unlawful transaction. (**App. P**, pages 217-218]. Furthermore, any such fees were at best nominal in amount and insufficient to support license revocation.

7. Agent Christine Gigicos has no knowledge that James Veigle, Charles Veigle, Nancy Voegtlin, or Robert Kelly were aware that the cash advance was used to purchase cocaine. [**App. P**, pages 217-218]

8. On one occasion, Agent Gigicos was informed by Darin Terry, a doorman employed by Rachel's, that he would be the "look-out" for Agent Gigicos and her associates while they received a private performance in the VIP room at Rachel's. Mr. Terry was looking out for management, in particular Janice Royce, as well as other customers and bouncers. [**App. P**, pages 167-170, 201 and 215]

9. Agent Gigicos has no personal knowledge as to any violation committed under the City of Casselberry

Code of Ordinances by James Veigle, Charles Veigle, Nancy Voegtlin, or Robert Kelly. [**App. P**, pages 174-175]

10. Janice Royce, General Manager of Rachel's, terminated the employment of two day shift dancers upon finding out that the two had engaged in oral sex in the establishment. [**App. P**, pages-177]

11. Agent Gigicos never witnessed any acts of prostitution or drug transactions occur in the presence of Janice Royce. Nor was Ms. Royce present during any alleged "sex shows" that purportedly occurred at the establishment. [**App. P**, page 216]

12. Agent Gigicos interpreted statements by Rachel's employees that Ms. Royce was a "dragon lady" and a "hard ass" to mean that Ms. Royce strictly enforced the rules as to what the employees could and could not do. [**App. P**, pages 216-217]

13. Agent William Christiansen never observed any acts of prostitution or ads in violation of the City of Casselberry Code of Ordinances committed in the presence of James Veigle, Charles Veigle, Nancy Voegtlin, or Robert Kelly. [**App. P**, page 249]

14. Agent Christiansen was informed that persons who operated as "lookouts" were doing so in an attempt to conceal from Janice Royce certain employee conduct prohibited by Rachel's and Ms. Royce. [**App. P**, pages 250-251]

15. When Ms. Royce would come to an area where employees were engaging in conduct prohibited by Rachel's, the employees would cease engaging in the conduct. [**App. P**, page 251]

16. Agent Christiansen has no evidence that stockholders, directors, or officers of Seminole Entertainment, Inc. had knowledge of or condoned the actions of lower level personnel, such as Frank Otero. [**App. P**, page 253]

17. Agent Cleveland Ray Peters characterizes Frank Otero and Darin Terry as lower level management personnel with Rachel's. [**App. P**, page 398]

18. Agent Peters discovered over the course of his investigation that Janice Royce had a reputation among the employees of Rachel's for being "hard," in that she would require the dancers to not engage in performances prohibited by Rachel's and city ordinances. [**App. P**, pages 399-400]

19. Agent Peters never observed James Veigle, Charles Veigle, Nancy Voegtlin, or Robert Kelly engage in any illegal activity and he has no knowledge that they engaged in or condoned any illegal activity. [**App. P**, page 402]

20. According to Agent Peters, the only person at Rachel's who had knowledge of the alleged drug transactions was Robert Rexroad. [**App. P**, page 405]

Even in cases not involving freedom of expression rights (which are implicated here) the evidence in this case does not satisfy the requisite standard of knowledge in order to revoke Seminole Entertainment Inc.'s license and thus it should not stand. *Woodbury v. State Beverage Department*, 219 So.2d 47 (Fla. 1st DCA 1969); *Freeze v. Department of Business Regulation*, 556 So.2d 1204 (Fla. 5th DCA 1990).

(d)

THE CASSELBERRY CITY CODE VESTS UNBRIDLED AND UNFETTERED DISCRETION WITH THE CITY COMMISSION TO DETERMINE WHETHER A LICENSE SHOULD BE REVOKED OR SUSPENDED BASED UPON THE SAME (ALLEGED) CRIMINAL CONDUCT

The Casselberry Code, specifically Sections 14-92 and 14-93 are an unconstitutional prior restraint in violation of Article 1, Section 4 of the Florida Constitution because they vest overbroad discretion in the city commission to determine whether a license should be suspended or revoked. This discretion is further exacerbated due to the fact that the code, Section 14-92, contains two subsections designated "c," one titled "Illegal activity/suspensions" and the other titled "Revocation." The first subsection "c" deals with the suspension of an adult entertainment license based upon three or more "violations" and "convictions." Under this subsection, criminal conduct resulting in a "conviction" can result in a suspension starting with thirty days, increasing to ninety days, and then to 180 days. However, in this case, the City proceeded under the second subsection "c," styled "Revocation," paragraphs (3), (4) and (6), which allow the City to revoke an adult entertainment license absent a criminal conviction *or* an escalation in criminal activity. As such, this section is not only unduly vague and inconsistent, but vests unbridled discretion with the City to determine whether it will suspend a license based upon three or more criminal convictions or, in the alternative, to revoke a license without any evidence that a criminal conviction has been obtained, reviewed or adjudicated by the court. Further, both subsections can be predicated upon the same (alleged) violations, e.g., Chapter

800, Florida Statutes [sexual offenses] or Chapter 895, Florida Statutes [illicit drug activity]. See Section 14-92(a), City Code. However, once again, the operative distinction is that the City has the unfettered discretion, as it did in this case, to proceed under the latter subsection (c), paragraphs (3), (4), and (6) absent criminal conviction. As such, Sections 14-92 and 14-93 violate Article 1, Sections 4 and 9 of the Florida Constitution.

Any licensing scheme (predicated upon restricting free speech rights) which vests overbroad discretion in a government body is deemed an unconstitutional prior restraint. The underpinnings of this requirement (prohibiting overbroad discretion) is to prevent a government entity from denying a party its constitutional right to freedom of expression – without constitutionally adequate and fundamental fairness in the process. Here it is clear that the city is vested with unconstitutional discretion as can be seen simply by reviewing the city code. As support for this assertion, the Plaintiff relies upon the following authorities. *Diamond v. City of Taft*, 29 F.Supp. 2d 633, 648-650 (E.D. CA), affirmed 215 F.3d 1052 (9th Cir. 2000); *Dease v. City of Anaheim*, 826 F.Supp. 336, 342-344 (C.D. CA 1993); *MJA Susu, Inc. v. County of Benton*, 853 F.Supp. 1147, 1151-1152 (D. MN 1994); *Lady Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1361-1362 (11th Cir. 1999); *University Books, Inc. v. Miami-Dade County*, 14 Fla.L.Weekly F. 0178, D181-182 (S.D. Fla. 2001); *Nichols v. Village of Pelham Manor*, 974 F.Supp. 243 (S.D. NY 1997); *Franken Equities, L.L.C. v. City of Evanston*, 967 F.Supp. 1233 (D. Wy. 1997); *BJS No. 2, Inc. v. City of Troy*, 87 F.Supp.2d 800 (S.D. OH 1999); *Silver Spurs, Inc. v. Town of Palm Shores*, 1997 U.S. Dist. Lexis 23742 (M. D. Fla. 1997); *Gayety Theaters, Inc. v. City of Miami*, 719 F.2d

1550 (11th Cir. 1983); *Spokane Arcades, Inc. v. City of Spokane*, 1997 Wash. App. Lexis 1989 (Ct. App. Wash. 1997); *Cannabis Action Network v. City of Gainesville*, 907 F.Supp. 1508 (N.D. Fla. 1995); *Lee v. City of Newport*, 1991 U.S. App. Lexis 26785 (6th Cir. 1991); *Genusa v. City of Peoria*, 619 F.2d 1203 (7th Cir. 1980).

(e)

THE CITY RELIED UPON THE WRONG (AND DE MINIMIS) STANDARD OF REVIEW, SPECIFICALLY PREPONDERANCE OF THE EVIDENCE AND FURTHER IMPROPERLY AND UNLAWFULLY SHIFTED THE BURDEN OF PROOF TO SEMINOLE ENTERTAINMENT, INC. TO ESTABLISH THAT ITS ADULT ENTERTAINMENT LICENSE SHOULD NOT BE PERMANENTLY REVOKED

Even in administrative cases which do *not* involve constitutional rights protected under Article I, Section 4 (which, as set forth above at page 56 and infra at 59, are subjected to a higher standard of review), the government entity is still required to prove its allegations by clear and convincing evidence. That is in direct contravention of the city's adult entertainment code which states that the burden of proof is preponderance of the evidence. See Section 14-93(b)(3), City Code. In this case the city initiated its revocation in reliance upon the preponderance standard, received and accepted testimony, and questioned witnesses. It was not until the deliberation stage of the proceedings that the city commission took an about face and gratuitously stated that it would in fact review the evidence based upon a clear and convincing standard of review. This constitutional infirmity is not cured by this political rhetoric. Further, there is nothing in the record to

indicate that the city commission understood what the clear and convincing standard of review entailed – other than the revocation order prepared by its attorneys after the fact. As support for this point, Plaintiff relies upon the following authorities. *Department of Banking and Finance v. Osborne Stern & Company*, 670 So.2d 932 (Fla. 1996); *Ferris v. Turlington*, 510 So.2d 292 (Fla. 1987).

Further, the city commission improperly shifted the burden of proof to Seminole Entertainment, Inc. to disprove the charges as reflected by the commissioner's comments during their deliberation. The Supreme Court of the United States has repeatedly held that the entity seeking to restrict free speech rights has the burden in such proceedings. *Elrod v. Burns*, 427 U.S. 347, 362-363 (1976) [exacting scrutiny applied even if restrictions unintended but are the inevitable result of government action]; *United States v. O'Brien*, 391 U.S. 367 (1968) [expressive conduct]; *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) [commercial speech]; *Sable Communications of California, Inc. v. Federal Comm.*, 492 U.S. 115 (1989) [dial-a-porn legislation banning indecent telephone messages violated First Amendment]; *Reno v. ACLU*, 521 U.S. 844 (1997) [Internet speech]; *Riley v. Nat'l Fed. of the Blind of No. Carolina, Inc.*, 487 U.S. 781, 793-795 (1988) [requiring speaker to prove reasonableness unconstitutionally chills speech]; *Freedman v. Maryland*, 380 U.S. 51, 58 (1965) [burden of proof rests with the censor and same must bear the burden of persuasion]. See also, Article I, Sections 4 and 9, Florida Constitution.

(f)

THE CASSELBERRY ADULT CODE DOES NOT PROVIDE PROMPT JUDICIAL REVIEW WHEN THE CITY PERMANENTLY REVOKES AN ADULT ENTERTAINMENT LICENSE

Casselberry's judicial review provision appears in Section 14-93(d) of its adult entertainment code. Neither this provision or any other provision in Casselberry's Adult Code provides an abatement or stay of the revocation order pending review and decision on the merits by the court. Under this provision, an aggrieved party must file a lawsuit in the Seminole County Circuit Court. Obviously, there are few time constraints in ordinary civil actions. It is unfortunate that some cases can take years to resolve. Casselberry's Adult Code reflects its belief that "prompt judicial review" is satisfied by providing prompt judicial "access." As explained below, mere access to the courts is not sufficient to satisfy the United States Supreme Court's "prompt judicial review" requirement in prior restraint cases. See *4805 Convoy, Inc. v. City of San Diego*, 183 F.3d 1108 (9th Cir. 1999) [city's scheme for suspending and revoking license unconstitutional in that it did not provide for an **automatic stay** pending judicial review]; *Nightclub Management, Ltd. v. City of Canon Falls*, 95 F.Supp.2d 1027 (D. Minn. 2000) [although automatic stay went into effect pending city review of suspension/revocation, same was dissolved once city council rendered decision, thus law rendered unconstitutional]; *Spokane Arcade, Inc. v. City of Spokane*, 1998 Wash. App. Lexis 1237 (Ct. App. Wash. 1998) [until city enacts a mandatory stay, ordinance is unconstitutional in its entirety].

Any law that requires governmental approval, such as a license or permit, before one may engage in any form of

"expression" that is constitutionally protected is called a "prior restraint." See *Near v. Minnesota*, 283 U.S. 697 (1931). The suspension/revocation scheme contained in Casselberry's Adult Entertainment Code is a shining example of a prior restraint. In Casselberry one must obtain an adult entertainment license prior to operating a business where exotic dancers perform. Dancing, even nude dancing, is a form of expression protected under the Federal and Florida Constitutions. See *California v. LaRue*, 409 U.S. 109, 118 (1972); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975); *Schad v. Mt. Ephraim*, 452 U.S. 61, 66 (1981); *Barnes v. Glen Theatre, Inc.*, 501 U.S 560 (1991); and *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000). Therefore, Casselberry's adult licensing scheme is unquestionably a "prior restraint."

Although prior restraints are not unconstitutional per se, the Supreme Court has repeatedly ruled that any system of prior restraints on expression "comes to this Court with a heavy presumption against its constitutional validity." *Bantam Books v. Sullivan*, 372 U.S. 58, 70 (1963); *New York Times Co. v. United States*, 403 U.S. 372 (1963); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *Carroll v. Commissioners of Princess Anne*, 393 U.S. 175, 181 (1968); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975); and *Vance v. Universal Amusements Co.*, 445 U.S. 308, 315-16 (1980). Because of the danger that protected expression might be suppressed, the Supreme Court has set out certain procedural safeguards that all legislative prior restraints must contain in order to pass constitutional muster. Beginning with *Freedman v. Maryland*, 380 U.S. 51, 58-60 (1965), and for twenty-five years thereafter, the Supreme Court has repeatedly ruled that any system of prior restraints

must contain three procedural safeguards. **First**, any restraint imposed prior to a final judicial determination must be for a specified, brief period of time and must be limited to preserving the status quo. **Second**, prompt judicial review must be available. **Third**, the government must bear both the burden of seeking judicial review and the burden of proof.[22] See, e.g., *Teitel Film Corp. v. Cusack*, 390 U.S. 139, 141 (1968); *Blount v. Rizzi*, 400 U.S. 410, 417 (1971); *United States v. Thirty-seven Photographs*, 402 U.S. 363, 367 (1971); and *Southeastern Promotions, Ltd. v. Conrad, supra* at 560. Thus, for twenty-five years after the Freedman decision there was no doubt concerning the requirements of laws such as Sections 14-92 and 14-93 of the Casselberry Adult Entertainment Code. Then came *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990).

FW/PBS was a plurality decision written by Justice O'Connor in which only Justice Kennedy joined. Part II of the opinion is the only part that dealt with the prior restraint doctrine, and therefore the only part relevant to this memorandum. Five other justices concurred in Part II, three with reservations that will be explained below. The case involved a Dallas licensing scheme, similar to Casselberry's, which required adult-oriented businesses to obtain a license as a prerequisite to operating. Justices O'Connor, Kennedy and concurring Justice Stevens first suggested that one of the three *Freedman* requirements, i.e., the requirement that the government bear the burden

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[22] A related prong of the prior restraint doctrine is that Casselberry not vest itself with overbroad discretion in its hearing process and in deciding whether a license should be suspended or revoked which is discussed supra at 56-57.

of instituting judicial procedures and carry the burden of proof in court, be eliminated (their reasoning is explained below). The court nonetheless found the Dallas ordinance unconstitutional because it lacked the two remaining Freedman safeguards, i.e., a specified brief period in which to grant or deny a license application and prompt judicial review. The court found these two safeguards to be "essential." Although the plurality failed to offer any enlightenment on the precise meaning of the term "prompt judicial review," Justice O'Connor mentioned the prompt judicial review requirement three times in her opinion. She referred to licensing laws that regulate protected expression as requiring "the possibility of,' or "an avenue for," or "availability of" prompt judicial review. 493 U.S. at 228-30. Other than these three references, the plurality failed to further define or discuss what they meant by "prompt judicial review." In fact, the Supreme Court has never specifically defined the term, but as explained below, our highest court has always used "prompt judicial review" to mean a prompt judicial "decision."

During the ten years following *FW/PBS*, Justice O'Connor's language has created a split in the federal courts over the meaning of prompt judicial review. The First, Fifth and Eleventh Circuits have all interpreted *FW/PBS* to require that a statute provide only ***access*** to judicial review.[23] See *Jews for Jesus, Inc. v. MBTA*, 984

[23] A Seventh Circuit case, *Graff v. City of Chicago*, 9 F.3d 1309 (7th Cir. 1993), has also been cited to support the argument that mere "access" satisfies the prompt judicial review requirement, but it is not a proper citation. *Graff* was a plurality, *en banc* decision rendered by twelve sharply divided judges. Judge Manion and four others concluded that common law certiorari satisfied the prompt judicial review

(Continued on following page)

F.2d 1319 (1st Cir. 1993); *TK'S Video, Inc. v. Denton County, Tex.*, 24 F.3d 705 (5th Cir. 1994); and *Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251 (11th Cir. 1999). The Fourth, Sixth and Ninth Circuits have rejected any modification by *FW/PBS* of the traditional meaning of prompt judicial review and have maintained that a judicial ***decision*** is necessary to satisfy the requirement. See *East Brooks Books, Inc. v. City of Memphis*, 48 F. 3d 220 (6th Cir. 1995); *Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884 (6th Cir. 2000); *11126 Baltimore v. Prince George's County, MD*, 58 F.3d 988 (4th Cir. 1995); *Baby Tam & Co., Inc. v. City of Las Vegas*, 154 F.3d 1097 (9th Cir. 1998); and *4805 Convoy, Inc. v. San Diego*, 183 F.3d 1108 (9th Cir. 1999).

The specific issue which this court must decide is whether the "prompt judicial review" requirement in prior restraint cases is satisfied by prompt judicial "access" or whether a prompt judicial "decision" is required or, alternatively, whether an automatic stay of the license revocation satisfies this requirement – pending final judicial decision. As noted above, the Casselberry Adult Entertainment Code provides for judicial access only.[24] Since

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requirement, although "access" *vis á vis* "decision" was never discussed. The principal opinion was not majority opinion of the court. The seven judges who either concurred or dissented all indicated their disagreement with Judge Manion's conclusion that availability of judicial review satisfied the prompt judicial review requirement. Accordingly, the *Graff* decision may not be properly cited as holding that the prompt judicial review requirement is satisfied by judicial availability.

[24] The city purportedly attempts to require "prompt judicial review" but obviously it is not vested with the authority to require same. See Section 1493(d).

Florida courts are not bound by any of the federal decisions cited above, other than decisions of the United States Supreme Court, *State v. Dwyer*, 332 So.2d 333 (Fla. 1976); *Board of County Commissioners v. Dexterhouse*, 348 So.2d 916 (Fla. 2d DCA 1977); and *Martin v. Board of County Commissioners*, 364 So.2d 449 (Fla. 1978), this Court must look to its own good judgment and United States Supreme Court case law in rendering its decision.

There are a number of compelling reasons why this court should rule that prompt judicial review is satisfied only by a prompt judicial decision and that at a minimum an automatic stay is required.

First, in every prior restraint decision rendered by the United States Supreme Court between *Freedman v. Maryland, supra*, and *FW/PBS v. Dallas, supra*, (in other words between 1965 and 1990), the Supreme Court has used the term "prompt judicial review to mean a prompt judicial decision. See, e.g., *Teitel Film Corp. v. Cusack, supra* at 141 (striking a Chicago ordinance because it did not contain a provision assuring "a prompt judicial decision on the question of the alleged obscenity of the film"); *Interstate Circuit v. City of Dallas, supra* at 690 n. 22 ("the assurance of a 'prompt final judicial decision' is made here, we think, by the guarantee of a speedy determination by the trial court"); *Blount v. Rizzi, supra* at 417 (defining prompt judicial review as "a final determination or the merits within a specified, brief period"); *United States v. Thirty-seven Photographs, supra* at 367-70 (using the term "prompt judicial review" as synonymous with "a prompt judicial decision'); and *Southeastern Promotions, Ltd. v. Conrad*, 420 *supra* at 560 (in outlining the *Freedman* requirements, the court stated "a prompt final judicial determination must be assured," and holding that where a

judicial decision was not obtained for more than five months, prompt judicial review was denied). Importantly, the Supreme Court has never so much as hinted that prompt judicial review means anything less than a prompt judicial decision.

Second, there is just no way that Justice O'Connor's use in *FW/PBS* of the terms "the possibility of," or "an avenue for" or "availability of" prompt judicial review can be properly interpreted to relax the *Freedman* prompt judicial review requirement. There are at least four reasons why this is apparent:

(a) When Justice O'Connor refers to "prompt judicial review," she cites *Freedman*, and there can be no doubt that *Freedman* required that "[a]ny restraint imposed in advance of a ***final judicial determination on the merits*** must . . . be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution." *Freedman v. Maryland*, 380 U.S. at 59 (emphasis added).

(b) Furthermore, in writing that the one *Freedman* requirement should be eliminated, Justice O'Connor stated that the two remaining requirements, i.e., that an ordinance provide for an administrative decision within a specified brief time and prompt judicial review, were "essential." *FW/PBS*, 493 U.S. at 228.

(c) When she discusses the dangers that licensing schemes pose to protected speech, Justice O'Connor states that the failure of a licensing scheme "to provide for definite limitations on the time within which the licensor must issue the license" renders it invalid because it "contains the same vice as a statute delegating excessive administrative discretion." *Id.* at 226-27. Now why would

she condemn a lack of time limitations imposed on a licensor to issue a license and condone a lack of time limitations imposed on a judicial reviewer to render a decision once a constitutional right (license to operate) has been denied? A lack of time constraints in either case results in the suppression of protected expression. After all, if an adult entertainment license is revoked, a license is no longer in effect and a stay will not be granted while judicial review is sought. To require that an application be acted upon within a specified brief time and then place no time restrictions on judicial review simply makes no sense – especially when the situation is more grave, e.g., license revocation. What good is the one without the other? In fact, Justice O'Connor recognized that the time requirements for an administrative decision and judicial review are actually identical. This is apparent when she states that "[t]he core policy underlying *Freedman* is that the license for a First Amendment-protected business must be issued within a reasonable period of time, because undue delay results in the unconstitutional suppression of protected speech." *Id.* at 228. As the South Carolina Supreme Court ruled a few months ago, prompt judicial review must mean a prompt judicial decision, "[o]therwise, the prompt judicial review requirement loses all significance since the protection afforded by judicial review is meaningful only when it can be anticipated within a brief time period." *Harkins v. Greenville County*, 553 S.E. 2d 886 (S.C. 2000), U.S. cert. Denied 2000 Lexis 797.

(d) Finally, Justice O'Connor never gave any indication that she was altering the *Freedman* prompt judicial requirement. Surely she would have made some explicit reference to the fact that she intended to alter a twenty-five year old decision with the importance of *Freedman v.*

Maryland – arguably the most important First Amendment decision in the Court's history. She certainly did not hesitate to announce the demise of the *Freedman* requirement that the government institute judicial proceedings and carry the burden of proof. It makes no sense that she would pussyfoot around with the prompt judicial review requirement. If she had intended to weaken the prompt judicial review requirement, she would have undoubtedly announced that fact without equivocation.

In sum, it is clear that Justice O'Connor was referring to a judicial "decision" within a specified, brief time when she used the term "prompt judicial review." To conclude otherwise is to ignore the obvious.

Third, even if Justice O'Connor's decision could be reasonably interpreted as requiring mere judicial "access," her opinion is not binding on this court because a majority of the justices did not join in her reasoning. Justice O'Connor wrote Part II of the *FW/PBS* decision, i.e., the part dealing with "prior restraint," for herself and Justice Kennedy. Justice Stevens dissented in part but concurred in Part II. Justices Brennan, Marshall and Blackmun concurred but made it clear they believed all three of the *Freedman* safeguards were required. Justice Brennan wrote their concurring opinion in which he stated: " . . . I believe that our decision two Terms ago in *Riley v. National Federation of Blind of N.C., Inc.*, 487 U.S. 781, 101 L.Ed. 2d 669, 108 S.Ct. 2667 (1988), mandates application of all three of the procedural safeguards specified in *Freedman v. Maryland*, 380 U.S. 51, 13 L.Ed. 2d 649, 85 S.Ct. 734 (1965), not just two of them . . . " 493 U.S. at 238-39. Chief Justice Rehnquist and Justice White did not join in Part II of the opinion because they believed that the Dallas licensing scheme was a valid time, place and

manner restriction which should not be analyzed as a prior restraint. Justice Scalia likewise did not join it Part II of the opinion because he does not believe, as he has stated on more than one occasion, that erotic dancing and the sale or rental of sexually explicit materials is protected by the First Amendment, therefore no prior restraint existed.

Accordingly, even if Justice O'Connor's opinion could be interpreted as weakening the "prompt judicial review" component of *Freedman*, *FW/PBS* still does not alter *Freedman*. It is well settled that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15 (1976). Clearly, the narrowest grounds on which the justices concurred in *FW/PBS* were that the Dallas licensing scheme constituted a prior restraint and that two of the required safeguards were lacking. These were the only grounds that the concurring justices could agree upon in Part II of the opinion. Six justices agreed on these grounds: Justices O'Connor, Kennedy, Stevens, Brennan, Marshall and Blackmun. Only three justices could agree on anything else in Part II. So whatever Justice O'Connor intended to do about the *Freedom* prompt judicial review requirement is irrelevant to this Court's decision. The *FW/PBS* decision does not in any manner attenuate the prompt judicial "decision" safeguard mandated by *Freedman*.

Fourth, it simply does not make sense that the United States Supreme Court would make prompt "access"

to the courts a requirement in prior restraint situations when we all have prompt access to the courts anyway (unless the Court feared that local governments might enact laws that deliberately and specifically deny prompt access to the courts). **Why would the Court make a requirement of something that already exists in the first place?**

Judge David R. Thompson of the Ninth Circuit Court of Appeals stated convincingly why providing mere "access" to the court is nonsensical. In *Baby Tam & Co., Inc. v. City of Las Vegas, supra*, Judge Thompson declared:

> We conclude that 'prompt judicial review' means the opportunity for a prompt hearing and a prompt decision by a judicial officer.
>
> The phrase 'judicial review' compels this conclusion. The phrase necessarily has two elements – (1) consideration of a dispute by a judicial officer, and (2) a decision. Without consideration, there is no review; without a decision, the most exhaustive review is worthless. In baseball terms it would be like throwing a pitch and not getting a call. As legendary major league umpire Bill Klem once said to an inquisitive catcher: 'it ain't nothin' till I call it.' This is also true of judicial review. Until the judicial officer makes the call, it ain't nothin'.

154 F.3d at 1101-02.

The prompt judicial review provided to the plaintiff in the instant case is an excellent example of what Judge Thompson was talking about. So far, the plaintiff has received "nothin'" – nothing that is except a business that is no longer operating (as intended), extensive attorneys' fees, and the suppression of rights that are guaranteed by

the constitution. This case provides a graphic illustration of how the government can deny its citizens' free speech rights when it is allowed to provide prompt judicial "access" rather than a prompt judicial "decision" in prior restraint situations.

Perhaps Casselberry will argue that it has no authority to provide prompt judicial "access" to the courts, and that only the Florida Legislature and the Florida Supreme Court with its rule-making powers can do so. Such an argument is correct, but that does not justify the denial of constitutional rights. In *Graff v. City of Chicago, supra*, three dissenting judges dealt with the same argument as follows:

> The majority posits the curious argument that Illinois law prevents municipalities from specifying what form of judicial review an administrative decision must receive. Perhaps. But since when does a city gain special dispensation to violate the United States Constitution because a state law contradicts it? Under the Supremacy clause, the state law must give.

The dissent in *Graff* also suggested that a municipality could petition the state legislature for a state-wide procedural rule that would provide prompt judicial access. The court in *Nightclubs, Inc. v. City of Paducah, supra*, made the same suggestion:

> Cities may also petition their state legislatures to pass laws that would obligate state courts to resolve municipal administrative appeals within a reasonably short period of time. **While these measures may seem burdensome at first blush, they are reasonable in light of the**

> **great importance this nation attaches to the freedom of expression.**

202 F.2d at 894 (emphasis added).

In fact, some states have already accomplished what the cited opinions suggest. See J. David Guerrera, *Prompt Judicial Review*, 62 Brook. L. Rev. 1217 (1996).

The only effective means of avoiding the wrongful suppression of protected expression in the context of adult entertainment licensing schemes is to require a statutorily imposed judicial determination on the merits. The conclusion is inescapable.

However, this argument of whether the city has the power to enact such procedures is academic in some respects because the city has the power to grant an automatic stay (pending judicial review and decision) of its license revocation. In fact, Casselberry's Adult Entertainment Code does provide for a stay pending the hearing process when the city commission determines the licensee's fate. The problem is, the automatic stay is lifted and vacated once the adult entertainment license is revoked. As stated by a number of courts, at a minimum Casselberry must provide an automatic stay otherwise its code is constitutionally infirm. *4805 Convoy, Inc, v. City of San Diego*, 183 F.3d 1108 (9th Cir. 1999) [city's scheme for suspending and revoking license unconstitutional in that it did not provide for an automatic stay pending judicial review]; *Nightclub Management, Ltd. v. City of Canon Falls*, 95 F.Supp.2d 1027 (D. Minn. 2000) [although **automatic stay** went into effect pending city review of suspension/revocation, same was dissolved once city council rendered decision, thus law rendered unconstitutional]; *Spokane Arcade, Inc. v. City of Spokane*, 1998 Wash. App.

Wash. App. Lexis 1237 (Ct. App. Wash. 1998) [until city enacts a mandatory stay, ordinance is unconstitutional in its entirety].

CONCLUSION

For all the grounds aforestated, the Petitioner would ask that this Court issue a Writ of Certiorari vacating or requiring that the city of Casselberry vacate its order revoking Seminole Entertainment, Inc.'s adult entertainment license.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished this 2nd day of March, 2001, via Hand Delivery Mail to **Donna McIntosh, Esquire,** Stenstrom, McIntosh, Colbert, Whigham & Simmons, P.A., 200 W. First Street, Sanford, Florida, 32771.

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